

# TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 530

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UNITED AUTOMOBILE, AIRCRAFT AND AGRICUL-  
TURAL IMPLEMENT WORKERS OF AMERICA,  
AFFILIATED WITH THE CONGRESS OF INDUS-  
TRIAL ORGANIZATIONS, UAW-CIO, APPELLANT,

vs.

WISCONSIN<sup>o</sup> EMPLOYMENT RELATIONS BOARD  
AND KOHLER CO., A WISCONSIN CORPORATION

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF  
WISCONSIN

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FILED NOVEMBER 21, 1955

JURISDICTION NOTED JANUARY 24, 1956





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**No. 530**

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, UAW-CIO, APPELLANT,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD AND KOHLER CO., A WISCONSIN CORPORATION

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

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JUDITH DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEB. 23, 1956

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# BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD

COMPLAINT OF KOHLER Co.—Filed April 15, 1954

The complainant above named complains that the respondents have engaged in and are engaging in unfair labor practices contrary to the provisions of Chapter 111 of the Wisconsin Statutes, and in that respect alleges:

(Formal Allegations of Identity Not Printed.) \* \* \*

7. That respondents named in paragraph 6 above have the general control, management and direction of the affairs of respondent Local Union.

8. That since June 19, 1952, said respondent unions have been the collective bargaining agent for the production and maintenance employees of the complainant company. That a collective bargaining contract between the complainant company and the respondent unions was entered into on the 23rd day of February, 1953, which said contract expired on the 1st day of March, 1954.

9. That the complainant and the respondent unions were unable to agree on the terms of a new collective bargaining [fol. 2] contract and the respondent unions called a strike of the production and maintenance employees in complainant's factory at Kohler, Wisconsin, which said strike began on the 5th day of April, 1954.

10. That on April 5, 1954, and continuously thereafter the two respondent unions have maintained mass picket lines in front of all the entrances into complainant company's plant, main office and employment office and medical department in such a manner as to obstruct entrance into the plant, main office and employment office and medical department, and to prevent all persons from entering the plant, main office and employment office and medical department except such as the respondents voluntarily permit to enter.

That said mass picket lines have included several hundred pickets in front of said entrances, particularly at the times when complainant company's employees would normally be entering the plant for work.

That said pickets were and are so disposed as to completely block the entrance to the plant.

That respondents have uniformly refused and continue to refuse entrance to all production and maintenance employees and to all other persons except office and supervisory employees and persons having a "pass" issued by respondents and that at times even some office and supervisory employees have been refused entrance.

11. That when persons approach said mass picket line and attempt to pass therethrough the pickets close ranks [fol. 3] and mass together, locking arms at times and making it impossible for anyone to gain entrance without entering into physical conflict.

That employees approaching said mass picket line in attempts to pass therethrough are greeted with loud yells of "hold that line," "nobody gets through," "go on home, you are not going to get in," "nobody is going through this line" and others of similar import.

That female employees approaching said mass picket line have been threatened that they would have their clothes torn off if they attempted to go through the line.

12. That at numerous times and specifically on April 12, 1954, at approximately 6:40 A. M., employees of complainant company have approached the mass picket line, demanded admittance and were refused.

That employees of complainant company desiring to go to work have summoned the aid of police officers who have ordered the mass picket line to stand back and let said employees through but that the pickets refused to obey said orders and continued to block access to the plant and refuse admittance to employees desiring to go to work.

That employees of complainant company desiring to go to work have been told by sheriff's deputies to desist their attempts to cross the picket line and that to persist in attempts to cross the picket line would probably result in their getting their heads cracked or killed.

[fol. 4] 13. That on April 5, 1954, and on divers occasions since that date entrances to the complainant company's plant have been blocked by automobiles parked therein so as to prevent any passage of an automobile or other conveyance therethrough.



14. That employees of complainant company who have attempted to circumvent said picket line have been pursued, physically restrained, assaulted, threatened and beaten up.

15. That employees of complainant company who have been lawfully standing on the street across from the picket line have been accosted by groups of pickets, who have crossed the street for that purpose and ordered to join the picket line or get off the street, and threatened with violence if they did not leave the street.

That such actions are a planned course of conduct, with the intent and purpose that respondent unions' claim that none of complainant company's employees desire to go to work not be disproven by the presence on the street of large numbers of employees obviously desiring to go to work.

16. That telephone calls have been made to the homes of employees who have evidenced a desire to go to work or have succeeded in obtaining entrance to the plant threatening violence to said employees and their families unless they desisted their attempts to go to work and joined the picket line.

17. That said mass picket line has prevented persons desiring medical aid from entering the complainant company's medical department unless they obtained a "pass" signed by a union official; that persons desiring to enter [fol 5] said medical department, including girls of high school age, have been prevented from passing through said picket line and ordered to obtain a "pass" from the union headquarters located in a tavern and dance hall located approximately one half mile from said medical department.

That employees of complainant company have been refused such a "pass" unless they joined the union and participated in the picket line.

18. That business visitors of complainant have been prevented from passing through said picket line to enter the main office of the company unless they first visited the union headquarters and obtained a "pass" signed by a union official.

19. That the above mentioned unlawful acts were done at the instance and under the direction and control of the union respondents aforesaid.

That the above mentioned individual respondents or

dered, directed, controlled, advised, abetted or participated in the above mentioned unlawful acts.

Wherefore complainant company prays that an order may be entered by the Wisconsin Employment Relations Board requiring respondents herein to cease and desist from the unfair labor practices above set forth, and for such other and further orders as the Wisconsin Employment Relations Board may deem appropriate.

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD

ANSWER TO COMPLAINT

[fol. 6] Now comes the respondents above named, by Max Raskin, their attorney, and in answer to the complaint allege as follows:

1. Allege that the complainant company is a corporation engaged in interstate commerce, and that by reason thereof the labor relations between such company and the respondent unions and their agents, and employees, are subject to the Labor Management Relations Act of 1947 and amendments thereto.

2. Allege that the Wisconsin Employment Relations Board does not have jurisdiction over the labor dispute as set forth in the complaint.

3. In further answer to the complaint, respondents admit the allegations contained in paragraphs one, two, three, four, five, six except sub-paragraph (w) thereof, seven, eight and nine.

4. That the respondents deny each and every allegation and statement of fact set forth in any and all paragraphs, sub-paragraphs and sentences, in said complaint contained, wherever found, not specifically admitted herein.

Wherefore respondents pray that the complaint be dismissed.

[fol. 7] IN CIRCUIT COURT OF SHEYBOYGAN COUNTY,  
WISCONSIN.

PETITION—Filed May 25, 1954

Now comes the Wisconsin Employment Relations Board, petitioner in the above entitled matter, by its attorneys, Vernon W. Thomson, Attorney General, Stewart G. Honeck, Deputy Attorney General, and Beatrice Lampert, Assistant Attorney General, and for cause of action alleges and shows to the court:

[fol. 8] 1. That the Wisconsin Employment Relations Board is and at all times mentioned herein, was an administrative body created and existing pursuant to Ch. 111 of the Statutes of Wisconsin for 1947 and that L. E. Gooding is the chairman and J. E. Fitzgibbon and Morris Slavney are commissioners and members of said board.

2. That the respondent, Local Union Number 833, United Automobile Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations—UAW-CIO, is a labor organization composed of employees employed in Sheboygan County, Wisconsin; and that said respondent has its principal office and usually transacts business at 530A North 8th Street in the City of Sheboygan, Sheboygan County, Wisconsin.

3. That the respondent, United Automobile Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations—UAW-CIO, is a voluntary labor organization affiliated with the Congress of Industrial Organizations; that said respondent maintains an office at 225 E. Michigan Street, Milwaukee, Wisconsin; and that respondent, Local Union Number 833, described in the preceding paragraph, is one of its affiliates.

4. That on or about the 15th day of April, 1954, the Kohler Company, a Wisconsin corporation having its principal office in Kohler, Sheboygan County, Wisconsin, being an employer engaging the services of employees other than independent contractors to work for hire in the Village of Kohler, Sheboygan County, Wisconsin, in a nonexecutive [fol. 9] and nonsupervisory capacity, did file a complaint in writing with the petitioner charging the above named

respondents, their officers, agents and members with having engaged in unfair labor practices within the meaning of Sec. 111.06 of the Statutes of Wisconsin.

5. That after due notice and hearing upon said complaint, the petitioner did on the 21st day of May, 1954, make and file its decision, findings of fact, conclusions of law and interlocutory order with reference to said charges of unfair labor practice, and that a true and correct copy of said decision, findings of fact, conclusions of law and order is hereto attached, marked Exhibit A and made a part hereof.

6. That copies of said decision, findings of fact, conclusions of law and order were duly served upon the respondents above named; that said order since its issuance has been in full force and effect, and that the above named respondents have wholly failed and neglected to obey the said order since its issuance and have engaged in the conduct prohibited thereby.

7. That the respondents are continuing to engage in, promote and induce obstruction and interference with entrance to and egress from the Kohler Company premises, obstruction and interference with use of public streets, and other conduct prohibited by said order, Exhibit A; that they threaten to continue to do so; and that they have publicly stated they will not comply with said order.

8. That the petitioner has responsibility for enforcement of compliance with the provisions of Ch. 111 of the statutes [fol. 10] of the State of Wisconsin, including Sec. 111.06.

9. That the conduct of the respondents will work irreparable injury to the petitioner and to the citizens of the State of Wisconsin; will require the commencement of a multiplicity of suits; and that the petitioner has no adequate remedy at law for redress of such conduct.

10. That the petitioner has caused to be certified and filed in this court its record in the proceedings entitled "Kohler Co., a Wisconsin Corporation, Complainant, vs. United Automobile Aircraft and Agricultural Implement Workers of America, affiliated with The Congress of Industrial Organizations—UAW-CIO, et al. \* \* \* Case III, No. 5257 Cw-213, Decision No. 3740" including all documents and papers on file in the matter, the pleadings and testimony upon which the order therein was entered and



the findings and order of the board, to which record reference is hereby made and the same is incorporated herein as if specifically set forth.

Wherefore the petitioner prays that the court enter a judgment and decree confirming and enforcing all of the provisions of the interlocutory order herein referred to, Exhibit A; for appropriate temporary relief and restraining order preventing the respondents during the pendency of this proceeding from engaging in, promoting and inducing the conduct prohibited by said order; and for such other relief as the facts and circumstances may warrant.

Dated: May 25, 1954.

[fol. 11] EXHIBIT "A" TO PETITION

**Findings of Fact, Conclusions of Law and Interlocutory Order of Wisconsin Employment Relations Board**

The above entitled matter having come on for hearing before the Wisconsin Employment Relations Board on the 4th day of May, 1954, and having been adjourned and re-scheduled on the 12th day of May, 1954, and testimony having been taken on May 12, 13, 17, 18, and 19, 1954, the full Board being present and after considering the testimony, the arguments of counsel and being fully advised the Board makes the following Findings of Fact, Conclusions of Law, and Interlocutory Order.

**FINDINGS OF FACT**

1. That the officers, members and agents of Local Union No. 833, United Automobile Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations have engaged and are now engaging in mass picketing at the entrance to the plant of the Kohler Company at the village of Kohler, Wisconsin, and have been assisted and advised in such activities by Frank J. Sahrskoe, Robert Burkhardt, Jess Ferazza, Donald Rand, James Fiore, Frank Walleck and Raymond Majerus, International Representatives of the United Automobile Aircraft and Agricultural Implement Workers of America.

2. That the officers, members and agents of the Respondent union have attempted by force, threats, intimidation and by massing pickets at the various entrances to the Kohler [fol. 12] Company plant in Kohler, Wisconsin, to prevent the lawful work or employment by persons desiring to work for the Kohler Company.

3. That the officers, members and agents of the Respondent union by gathering in large numbers and mass formation around the various entrances to the Kohler Company and obstructing and interfering with the free use of the public streets in the village of Kohler, Wisconsin, particularly with Industrial Road.

4. That officers, members and agents of the Respondent Union have forcefully taken into custody persons attempting to enter the plant of the Kohler Company, forced them to accompany such officers members and agents to the strike headquarters of the Respondent Union and prevented them from pursuing their lawful work and employment. That in addition officers, members and agents of the Respondent Union have followed the cars of persons attempting to enter or leave the Kohler Company plant and picketed their homes and have threatened the persons desiring to work with physical injury.

Upon the basis of the above and foregoing Findings of Fact, the Board makes the following:

#### CONCLUSIONS OF LAW

That the officers, members and agents of Local Union No. 833, United Automobile Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, and Frank J. Sahorske, Robert Burkart, Jess Ferrazza, Donald Rand, James Fiore, [fol. 13] Frank Walleck, and Raymond Majerus as International Representatives, representing the United Automobile Aircraft and Agricultural Implement Workers of America, have violated Section 111.06 (2) (a) of the Wisconsin Statutes by picketing the domicile of persons desiring to work at the Kohler Company, and Section 111.06 (2) (f) of the Wisconsin Statutes by hindering and preventing persons desiring to be employed by the Kohler

Company by means of massed picketing and by means of obstructing and interfering with entrance to and egress from the plant of the Kohler Company and by obstructing and interfering with the free and uninterrupted use of the public roads, streets and highways.

Upon the basis of the above and foregoing Findings of Fact, and Conclusions of Law, the Board makes the following:

#### ORDER

It is ordered that the Respondent Unions; their officers, members and agents immediately cease and desist from

1. Coercing and intimidating any person desiring to be employed by the Kohler Company in the enjoyment of his legal rights, intimidating his family, picketing his domicile, or injuring the person or property of such persons or his employee.
2. Hindering or preventing by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of lawful work or employment by any person desirous of being employed by the Kohler Company.
3. Obstructing or interfering in any way with entrance [fol. 14] to and egress from the premises of the Kohler Company.
4. Obstructing or interfering with the free and uninterrupted use of public roads, streets, highways, railways or private drives leading to the premises of the Kohler Company.

It is further ordered that the Respondent Unions; their officers, members and agents take the following affirmative action:

1. Limit the number of pickets around the Kohler Company premises to a total of not more than 200, with not more than 25 at any one entrance. Such pickets are to march in single file and to at all times maintain a space of at least 20 feet in width at each entrance to the Kohler Company premises over which pickets will not pass and on which persons either on foot or in conveyance may freely enter or leave the premises without interference.

## IN CIRCUIT COURT OF SHEYBOYGAN COUNTY

## ANSWER TO PETITION FOR ENFORCEMENT

Now come the respondents above named, by their attorneys Max Raskin and David Rabinovitz, and in answer to the Petition for Enforcement heretofore filed, allege as follows:

1. Admit the allegations contained in paragraph 1.
  2. Admit the allegations contained by paragraph 2.
- [[fol. 15] 3. Admit the allegations contained in paragraph 3.

4. Admit the allegations contained in paragraph 4.
5. Admit the allegations contained in paragraph 5.
6. Admit that copies of the decision, findings of fact, conclusions of law and order were duly served upon the respondents; deny that the respondents have wholly failed and neglected to obey the said order since its issuance and deny further that they have engaged in the conduct prohibited thereby.

7. As to the allegations contained in paragraph 7, respondents deny that they are continuing to engage in, promote and induce obstruction and interference with entrance to and egress from the Kohler Company premises; deny that they are engaging in the obstruction and interference with the use of public streets; deny that they are continuing other conduct prohibited by said order, Exhibit A; deny that they threaten to continue to do so; deny that they have publicly stated they will not comply with said order.

8. Admit the allegations contained in paragraph 8.

9. Deny the allegations contained in paragraph 9.

10. Respondents have no information with respect to the allegations contained in paragraph 10, and therefore put petitioner to its proof.

11. Deny each and every allegation not hereinbefore specifically admitted.

[[fol. 16] In further answer to the petition for enforcement respondents set forth as follows:

(a) That the respondents are labor organizations representing the employees in the production and maintenance



departments of the Kohler Company and that such labor organizations were duly certified to represent such employees for collective bargaining by the National Labor Relations Board, pursuant to the Labor-Management Relations Act of 1947 and the amendments thereto.

(b) That the Kohler Company is a corporation organized under the laws of the State of Wisconsin, and is engaged in the manufacture and sale of plumbing fixtures, heating equipment, electrical plants, air cooled engines, and precision parts, which products are distributed throughout the United States, that it is engaged in commerce and trade affecting commerce, as defined in Sections 2 (6) and 2 (7) of the Labor Management Relations Act of 1947.

(d) That the Labor Management Relations Act of 1947, adopted by the Congress, is a law regulating commerce as set forth in Section 101 and Section 204 of the Act as amended.

(d) That on the 23rd day of February, 1953, the said respondents and the Kohler Company entered into a labor contract, which contract expired on the 1st day of March 1954.

(e) That prior to January 1, 1954, the respondents terminated the labor contract as of March 1, 1954, pursuant to the requirements of Section 8 (d) of the Labor Management Relations Act of 1947, and that thereafter [fol. 17] the Federal Mediation and Conciliation Service, acting under the Notice of Termination of Contract, intervened and proceeded to assist in the negotiations of a contract following the termination date aforesaid.

(f) That on or about April 5, 1954, the respondent unions because of the failure of the Kohler Company to compromise and agree upon wages, arbitration, pensions, seniority and other working conditions, left the employment of the company individually and in concert and in agreement with others, and thereafter commenced to peacefully picket the company premises, and that such peaceful picketing is presently in progress.

(g) That on or about the 16th day of April, 1954, the Kohler Company filed with the Wisconsin Employment Relations Board a complaint alleging that the respondents were guilty of unfair labor practices.

(h) That the respondents herein made answer thereto and alleged that the Wisconsin Employment Relations Board, the petitioner herein, is without jurisdiction to hear and determine the issues, for the reason that the government of the United States through the Labor Management Relations Act of 1947, *be* amended, preempted the field of Labor-Management relations.

(i) That Chapter 111, and particularly that portion thereof which deals with unfair labor practices, to-wit, Section 111.06, which is the basis for the order sought to be enforced herein, is in direct conflict with the Labor Management Relations Act of 1947, as amended, and that such labor management relations are under the exclusive [fol. 18] jurisdiction of the National Labor Relations Board, as provided in the Act, particularly, Sections 10(a), 8(a) and 8(b).

(j) In further answer to the Petition for Enforcement, the respondents allege that they have complied with the order issued by the Board and specifically with that part of the order which requires affirmative action on their behalf.

(k) The respondents further allege that this court has no jurisdiction to enforce the order (1) because the board did not have jurisdiction to enter the order, by reason of the preemption of the subject by the Congress of the United States; (2) respondents deny that they or any person on their behalf has in any wise failed or neglected to obey the order of the Board, and (3) deny that the findings of fact made by the Board are supported by credible and competent evidence in the record.

Wherefore respondents demand that the Petition for Enforcement and, in junction, by the Wisconsin Employment Relations Board, be dismissed.

Max Raskin and David Rabinovitz, Attorneys for Respondents.

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*Duly sworn to by Max Raskin, jurat omitted in printing.*

[fol. 19] IN CIRCUIT COURT OF SHEBOYGAN COUNTY

OPINION AND DECISION OF THE CIRCUIT COURT—August 30,  
1954

Two separate proceedings are before the Court under two different titles. The first filed was initiated by a petition filed by the Wisconsin Employment Relations Board against two unions and their officers, members of the union, and several named individual respondents. The second proceedings is upon the petition of both unions against the Wisconsin Employment Relations Board and the Kohler Company as respondents, seeking a review of the proceedings from which the order emanated and was filed, and asking for a reversal of the order and a dismissal of the complaint of the Kohler Company. This memorandum decision, of course, must relate to both proceedings.

I believe that it will be agreed by anyone who has made even a casual study of Chapter 111 of the Wisconsin Statutes and the cases that have construed that Act during the years, that the inquiry before this Court in the first proceedings, asking for a judgment of enforcement of the order of the Board, gives to the Court a very limited area and the inquiry is very confined.

This Court sits now as an appellate court to review the proceedings had before the Board and to pass upon the question of whether errors of law were committed by the Board in exercising the jurisdiction that the Statutes vest the Board with. The Court is not authorized in these proceedings to take testimony. The Court could, upon timely application and notice, order that more testimony [fol. 20] or additional evidence be taken by the Board. I agree with counsel for the Union that no formal motion in that regard is necessary, but the stubborn fact is no application to do that, that is, to remand the proceedings back to the Board for the taking of additional testimony, has been made and the desire is stated only categorically and casually in the arguments of counsel in these proceedings, unless it be considered that the petition of the two unions to review necessarily encompasses the request that it be remanded for further testimony.

The Court has made a very careful study of the record in both proceedings, that is, to say that all the pleadings have been read and studied and certain portions of it read a second time. The Court did not, because of a peculiar circumstance, have time to examine the some 154 or 155 exhibits that were introduced at the hearings before the Board, which consumed many days.

I personally regret that the inquiry before this Court in these proceedings is so narrow. I would much prefer if this Court had authority in law to apply equitable principles as would be the situation if the complainant here had seen fit to invoke the equity jurisdiction of this Court in seeking a temporary injunction and eventually a permanent injunction. Reasonable minds may differ and disinterested, impartial persons may not agree as to the seriousness of the acts which the Board has found constitute unfair labor practice. This Court has no right to make inquiry as to the fairness or unfairness of the original demands of the Union as made early in the year, February, 1954, or maybe preceding the expiration of [fol. 21] the contract in February, 1954, maybe the demands were in some form made in January of 1954. The Court has no right to comment upon the soundness of the Company's position as to the demands of the two unions. The wisdom or lack of wisdom in calling the strike is not for this Court to decide. This Court has no right now to even make any observations as to the realistic views or attitudes of either the Company, who is the complainant here, or the two unions, nor in any type of critical language make any type of findings, even though it be dicta, as to the character and the tempo and the type of settlement negotiations. The Court has no right to pass upon the good faith or lack of good faith of any parties to this dispute, even though the Court may have its own opinion with reference to all of these subjects.

The principal contention of the two unions is that the Labor Board and this Court lack jurisdiction in the matter now before the Court in a formal manner. The lack of jurisdiction as claimed by the respondent unions is based upon the claim that the National Labor Relations Act



of 1947, the Congressional enactment, has pre-empted the field of labor controversies, employer and employee management and that there is no field left for state agencies like the Wisconsin Employment Relations Board and the Wisconsin courts to act with jurisdiction. With this contention I must respectfully disagree with the unions that are parties to these proceedings.

It is perfectly clear that proper state agencies, in which authority is given by statutes, and the courts that have certain inherent powers, have a right even in the labor [fol. 22] controversy field where unfair labor practices are charged, that state administrative boards like the plaintiff in these actions or the petitioner in this one action, have a right and an area based upon state's rights, as distinguished from the rights under the Constitution that the Federal Government has preempted unto itself.

It would seem most unreasonable and illogical if any court should hold that a state court of record would be impotent to restrain the commission of acts that are in themselves illegal per se. There is no inherent right on the part of individual members of a union or the union as an organization or its officers in directing it to engage in mass picketing. There is no inherent right on the part of any of the members of unions to intimidate, to threaten, to assault or to unlawfully interfere with the liberties of any person, so it would seem to me that the complaint is groundless when it is exerted on the proposition that these types of acts should not be restrained.

There is one point made by counsel for the Unions that has given me pause and has concerned me during these arguments, to which I listened most attentively. The fact is the question arose in my mind independent of counsel's argument but counsel's logical approach to the question further agitated my thinking and made me less sure of a position that could be taken with reference to it, which is the position taken by the Labor Relations Board. That point is that something must transpire after the filing of the order, which was based upon findings of fact and conclusions of law relating to the testimony taken at the various hearings, and that ~~our~~ evidence must be [fol. 23] produced before this Court or something in a

formal way pointed out in these proceedings that shows that at a particular time after the filing of the order that the Wisconsin Employment Relations Board could come into court and ask for an enforcement decree of the order that it had previously filed. I believe the answer to that claim, as good as it sounds, is found right in the statute itself and if you are to give full and ordinary meaning to the use of words, the Court must disagree with that contention, with the others.

Sub-section (7) of Section 111.07 says:

"If any person fails or neglects to obey an order of the board while the same is in effect the board may petition the circuit court of the county wherein such person resides, or usually transacts business for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court its record in the proceedings, including all documents and papers on file in the matter, the pleadings and testimony upon which such order was entered, and the findings and order of the board. Upon such filing the board shall cause notice thereof to be served upon such person, \* \* \* and thereupon the court shall have jurisdiction of the proceedings and of the question determined therein."

That statute is purely a directory statute. The plaintiff, Wisconsin Employment Relations Board, is an administrative body invested with certain powers, authority and duties and the presumption is that the members of that Board, being public officers, acted within the law and [fol. 24] within their jurisdiction and that they had not only the right but the duty to exercise a discretion as to whether enforcement proceedings should be initiated or not. The statute does not define or declare the type of investigation to be made by the Board after the order is filed, which would entitle them or require them, that is, the Board, to initiate the proceedings for enforcement of the order. This record is sufficient unto itself to show that the Board did not violate its discretion and that its discretion was exercised in favor of instituting these proceedings.

It follows from what has been said that the petition for review by the two Unions named as petitioners against the

Wisconsin Employment Relations Board and the Kohler Company, asking for a review of the order and a reversal of the order and a dismissal of the complaint, be and hereby is dismissed.

It follows, of course, from what has been said that the plaintiff, Wisconsin Employment Relations Board, in its enforcement proceedings against the named respondents, shall have judgment of enforcement of the order filed by the Wisconsin Employment Relations Board on May 21, 1954, without modification and the order is in all things confirmed.

Dated: August 30, 1954.

IN CIRCUIT COURT OF SHEBOYGAN COUNTY

JUDGMENT—September 1, 1954

The above entitled matter having come on for hearing on the 30th day of August, 1954 before the court without a jury on the petition of the Wisconsin Employment Relations Board pursuant to Sec. 111.7 (4) and (7) of the Wisconsin Statutes for enforcement of a certain interlocutory order of said board, Beatrice Lampert appearing for the Wisconsin Employment Relations Board, Max Raskin and David Rabinovitz appearing for the respondents, and Lyman Congor and Lucius P. Chase appearing for the intervenor, Kohler Company, and the court having considered the arguments and briefs of counsel, and having reviewed the record returned by said board and being fully apprised in the premises, and having on the said date issued from the bench its decision and directions for judgment, Now, Therefore,

It Is Ordered, Adjudged and Decreed that the interlocutory order of the Wisconsin Employment Relations Board entered May 21, 1954 in the matter of "Kohler Co., a Wisconsin Corporation, Complainant, vs. United Automobile Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations—UAW-CIO, Harvey Kitzman, Frank J. Sahorski, Robert Burkhart, Jess Ferrazza, Donald Rand, James Fiore, Frank Walleck, Raymond Majerus, Local Union Number 833,

United Automobile Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations—UAW-CIO, Allan J. Graskamp, Arthur Rauer, E. H. Kohlhaugen, John J. Stieber, Bernard Majerus, Elmer H. Gross, Kenneth Nitsche, Curtiss R. Nack, Leo J. Prepster, Leo J. Breirather, Elmer A. Oskey, Gordon Majerus, Kenneth G. Klein, William E. Rawling, Edward C. Kalupa, John Konec, John M. Martin, Mattie [fol. 26] Marchiando, Arbor L. Brewer, Peter J. Gasser, Jr., Nick Vreckovic, Franklyn S. Schroeder, David Rabinowitz, John Doe and other persons unknown, respondents, Case HI, No. 5257 Cw-213, Decision No. 3740, be and the same is hereby confirmed and enforced, the court reserving jurisdiction to make such further order or judgment in the premises as may be necessary to give full force and effect to the order of the board and the enforcement thereof, on the evidence in the record or on the taking of such further evidence as appears to the court to be necessary, the present judgment and decree of the court to be deemed interlocutory as to those matters that may call for or require further action on the part of the court..

It Is Further Ordered, Adjudged and Decreed that the respondents United Automobile Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations—UAW-CIO, Local Union Number 833, United Automobile Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations—UAW-CIO, their officers, members and agents:

**A. Immediately cease and desist from:**

1. Coercing and intimidating any person desiring to be employed by the Kohler Company in the enjoyment of his legal rights, intimidating his family, picketing his domicile, or injuring the person or property of such persons or his employe.

2. Hindering or preventing by mass picketing, threats, intimidation, force or coercion of any kind [fol. 26a] the pursuit of lawful work or employment by any person desirous of being employed by the Kohler Company.



3. Obstructing or interfering in any way with entrance to and egress from the premises of the Kohler Company.

4. Obstructing or interfering with the free and uninterrupted use of public roads, streets, highways, railways or private drives leading to the premises of the Kohler Company.

B. Take the following affirmative action:

1. Limit the number of pickets around the Kohler Company premises to a total or not more than 200, with not more than 25 at any one entrance. Such pickets are to march single file and to at all times maintain a space at least 20 feet in width at each entrance to the Kohler Company premises over which pickets will not pass and on which persons either on foot or in conveyance may freely enter or leave the premises without interference.

Dated September 1, 1954.

[fol. 27] IN SUPREME COURT OF WISCONSIN

No. 240

WISCONSIN EMPLOYMENT RELATIONS BOARD, Respondent

vs.

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, Affiliated with the Congress of Industrial Organizations, UAW CIO, Local Union Number 833, United Automobile, Aircraft and Agricultural Implement Workers of America, Affiliated with the Congress of Industrial Organizations, UAW CIO, Their Officers, Members and Agents, Appellants

JUDGMENT—May 3, 1955.

This cause came on to be heard on appeal from the judgment of the Circuit Court of Sheboygan County and was argued by counsel. On consideration whereof, it is now

here ordered and adjudged by this Court, that the judgment of the Circuit Court of Sheboygan County, in this cause, be, and the same is hereby affirmed.

[fol. 28] IN SUPREME COURT OF WISCONSIN

No. 277

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, Affiliated in the Congress of Industrial Organizations, UAW CIO, Harvey Kitzman, Frank J. Sahorske, Robert Burkart, Jess Ferrazza, Donald Rand, James Fiore, Frank Walleck, Raymond Majerus; Local Union Number 833, United Automobile, Aircraft and Agricultural Implement Workers of America, Affiliated with the Congress of Industrial Organizations, UAW CIO, Allan J. Graskamp, Arthur Bauer, E. H. Kohlhagen, John J. Steiber, Bernard Majerus, Elmer H. Gross, Kenneth Nitsche, Curtiss R. Nack, Leo J. Prepster, Leo J. Briether, Elmer A. Oskey, Gordon Majerus, Kenneth G. Klein, William E. Rawling, Edward C. Kalupa, John Konec, John M. Martin, Mattie Marchiando, Arbor J. Brewer, Peter J. Gasser, Jr., Nick Vrekovic, Franklyn S. Schroeder, David Rabinovitz and John Doe and Other Persons Unknown, Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD AND KOHLER COMPANY, a Wisconsin Corporation, Respondents

JUDGMENT—May 3, 1955

This cause came on to be heard on appeal from the judgment of the Circuit Court of Sheboygan County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Sheboygan County, in this cause, be, and the same is hereby affirmed.

[fol. 29]

[File endorsement omitted]

IN SUPREME COURT OF WISCONSIN, AUGUST TERM, 1954

Nos. 240 and 277

WISCONSIN EMPLOYMENT RELATIONS BOARD, Respondent,

v.

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT  
WORKERS, ETC., AppellantsUNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT  
WORKERS OF AMERICA, ETC., et al., Appellants

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, et al.;  
Respondents

OPINION—May 3, 1955

Appeals from Two Judgments of the Circuit Court for Sheboygan County: Arold F. Murphy, Circuit Judge, Presiding. Affirmed

A judgment entered September 1, 1954, enforced an order of the Wisconsin Employment Relations Board, dated May 21, 1954. A judgment entered September 9, 1954 dismissed appellants' petition for a review of the same order. The appeals from the respective judgments have been consolidated.

[fol. 30] The Kohler Company produces and markets articles in interstate commerce. Local Union 833 UAW-CIO is the exclusive bargaining agent of the production workers of the Kohler Company, duly certified to be such by the National Labor Relations Board. The contract between the company and the union expired March 1, 1954, and negotiations between the parties for a new contract, in which the Federal Mediation and Conciliation Service participated proved fruitless. The production employees began a strike against the company April 5, 1954. At that time the National Labor Relations Board had under consideration a complaint by the union charging the company with the com-

mission of certain unfair labor practices in 1951 and 1952. The Board decided these adversely to the company on April 12, 1954, the company appealed to the federal courts and that appeal is pending. The National Board also has under consideration another complaint charging the company with other unfair labor practices in which, as yet, it has not reached a decision.

As soon as the strike began, the unions, through their officers and members, established a picket line around the company's premises and by various means dissuaded or prevented persons wishing to work from entering the plant. The company complained of the conduct of the pickets to the Wisconsin Employment Relations Board, alleging that the organizations and individuals named in the complaint were thereby guilty of unfair labor practices. That Board conducted a hearing on the complaint and on May 21, 1954 made findings of fact that the officers, members and agents of the union and certain named individuals had been and were then (1) engaged in mass picketing at the entrance to the plant of the Kohler Company; (2) that they have attempted to prevent the lawful work or employment of persons desiring to work for the Kohler Company by force, threats and intimidation and by massing pickets at the plant entrances; (3) that the large numbers and mass formations around the entrances obstruct and interfere with the free use of public streets; and (4) that the officers, members and agents of the union have forcefully taken into custody persons attempting to enter the plant of the Kohler Company, forced them to accompany such officers, members and agents to the strike headquarters of the respondent union and prevented them from pursuing their lawful work and employment. That in addition officers, members and agents of the respondent union have followed the cars of persons attempting to enter or leave the Kohler Company plant and picketed their homes and have threatened the persons desiring to work with physical injury.

Upon these findings of fact the Board made its conclusions of law declaring that the officers, members and agents of the local and international unions and the named individuals have violated sec. 111.06 (2) (a) and (f), Stats., by the conduct described in the findings of fact, and the Board then issued its order commanding the organizations



and natural persons to cease and desist from such conduct. The Board's order also directed the following affirmative action:

"It Is Further Ordered that the Respondent Unions, their officers, members and agents take the following affirmative action:

"1. Limit the number of pickets around the Kohler Company premises to a total of not more than 200, with not more than 25 at any one entrance. Such pickets are to march in single file and to at all times maintain a space at least 20 feet in width at each entrance to the Kohler Company premises over which pickets will not pass and on which persons either on foot or in conveyance may freely enter or leave the premises without interference."

[fol. 32] The statutory provisions which the Employment Relations Board concluded had been violated read:

"111.06 (2). It shall be an unfair labor practice for an employe individually or in concert with others:

," (a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

" (f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

The Board's order was entered May 21, 1954. On May 25, 1954 the Board petitioned the circuit court alleging that the organizations and persons affected by its order had refused to obey it but were continuing to engage in the conduct which the order prohibited. Other jurisdictional facts were alleged in the petition and the Board demanded a judgment and decree of enforcement. The unions and natural persons responded by denying their violation of

the Board's order and, further, alleged that the Company is engaged in interstate commerce, that the Wisconsin Employment Relations Board is without jurisdiction to hear and determine the issues which it here attempts to determine because the field of labor-management relations with which the Board attempts to deal has been preempted by Congress through the enactment of the Labor-Management Relations Act of 1947, as amended, (the Taft-Hartley Act) and jurisdiction in the premises exists exclusively in the National Labor Relations Board. The answer also alleged that the circuit court was without jurisdiction to enforce the Wisconsin Board's order because of the federal preemption of the field; and it denied that the findings of [Vol. 33] fact made by the Wisconsin Board were supported by credible competent evidence.

The circuit court rendered a written decision August 30, 1954 determining each issue favorably to the petition of the Wisconsin Employment Relations Board and on September 1, 1954 it entered judgment confirming the order of the Board and, by an injunction, decreed enforcement of that order. The injunction directed that the Union, their officers, members and agents

“A. Immediately cease and desist from:

“1. Coercing and intimidating any person desiring to be employed by the Kohler Company in the enjoyment of his legal rights, intimidating his family, picketing his domicile, or injuring the person or property of such persons or his employe.

“2. Hindering or preventing by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of lawful work or employment by any person desirous of being employed by the Kohler Company.

“3. Obstructing or interfering in any way with entrance to and egress from the premises of the Kohler Company.

“4. Obstructing or interfering with the free and uninterrupted use of public roads, streets, highways, railways or private drives leading to the premises of the Kohler Company.

"B. Take the following affirmative action:

"1. Limit the number of pickets around the Kohler Company premises to a total of not more than 200, with not more than 25 at any one entrance. Such pickets are to march in single file and to at all times maintain a space at least 20 feet in width at each entrance to the Kohler Company premises over which pickets will not pass and on which persons either on foot or in conveyance may freely enter or leave the premises without interference."

The unions and individuals enjoined have appealed from the judgment.

[fol. 34] BROWN, J. The conduct which the Wisconsin Employment Relations Board found to be a violation of sec. 111.06, Stats., as unfair labor practices, is virtually the same conduct as that which it had found to be a similar violation in *Allen-Bradley Local 111 v. Wisconsin E. R. Board* (1941), 237 Wis. 164, 295 N.W. 791. The present order and injunction are essentially the same as those issued by the Board and the court in the *Allen-Bradley Case*. The principal attack on it then, like the attack on the present order, was made on the ground that federal labor legislation has preempted the field and the National Labor Relations Board has exclusive jurisdiction over this controversy, which grows out of and affects labor relations. The enforcement order issued by the circuit court in the *Allen-Bradley Case* in all substantial particulars is the same as the one issued by the circuit court in the case at bar. We sustained the circuit court and the Board on such jurisdictional questions and on their exercise of the jurisdiction and we were affirmed by the Supreme Court of the United States in *Allen-Bradley Local vs Board*, 315 U.S. 740, 86 L. Ed. 1154.

As the facts of the present matter so closely parallel the *Allen-Bradley* facts there would be little cause to do more than affirm the judgment of the circuit court on the authority of *Allen-Bradley* except for a distinction to which appellants call attention, namely, that the Federal Labor Act has been amended since, in *Allen-Bradley*, the United States Supreme Court held that it did not deprive the state of jurisdiction under such circumstances. Appellants

argument is that the United States court was then constraining the National Labor Relations Act (the Wagner Act); which concerned itself only with unfair labor practices on the part of employers and thus left employees' practices to be controlled by the states; but that Act was amended in 1947 by the National Labor-Management Relations Act (the Taft-Hartley Act), which does define and discipline unfair labor practices by employees. Therefore, appellants assert, even though *Allen-Bradley* may have been right in its day, the present legislation, by bringing employees' labor practices within its scope, ousts state control and confers exclusive jurisdiction over them in the National Labor Relations Board.

The authoritative interpretation of federal statutes rests in the federal courts and their highest court does not agree with appellants' contention that the Taft-Hartley Act has taken from the states jurisdiction over such manifestations of labor relations as mass picketing, intimidation and obstruction of streets. In cases arising under Taft-Hartley the United States Supreme Court continues to cite *Allen-Bradley* to illustrate the circumstances in which the state authority may still operate. Thus, in *International Union v. Wisconsin Employment Relations Board* (1949), 336 U.S. 245, 93 L. Ed. 654, which was first before this court and is reported in 250 Wis. 550 (the Briggs & Stratton case), the state court enjoined recurrent and unannounced work stoppages designed to put pressure on the employer. The injunction was issued while the Wagner Act was in effect but the restraint continued after that act was superseded by Taft-Hartley. The Supreme Court of the United States therefore declared that it considered the state action in relation to both Federal Acts. And it said:

“ . . . However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Relations Act of 1947, that ‘Congress designedly left open an area for state control’ and that the ‘intention of Congress to exclude States from exercising their police power must be [fol. 36] clearly manifested.’ (Citing *Allen-Bradley*) We therefore turn to its legislation for evidence that Congress



has clearly manifested an exclusion of the state power sought to be exercised in this case."

So turning, the court found no such evidence and it said:

"... while the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states.

"It seems clear to us that this case falls within the rule announced in *Allen-Bradley*. . . ."

More recently the court has declared the same principle, crediting it to the same source. Thus in *Garner v. Teamsters Union* (1953), 346 U.S. 485, 98 L. Ed. 228, the employer sought to enjoin peaceful picketing by state action. The United States Supreme Court, distinguishing the situation from that in *Allen-Bradley*, said: (98 L. Ed. 228, 238)

"This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is 'governable by the State or it is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers. *International Union, U.A.W. v. Wisconsin Employment Relations Board*, 336 U.S. 245, 254, 93 L. ed. 651, 663, 69 S. Ct. 516. Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.' *Allen-Bradley Local, U.E.R.M.W. v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749, 86 L. ed. 1154, 1164, 62 S. Ct. 820. (Our italics.)

Still more recently, in *United Workers v. Laburnum Corp.* (1954), 347 U.S. 656, 98 L. Ed. 1025, the court repeated the language just quoted from the *Garner Case*, against giving credit to *Allen-Bradley*.

[fol. 37] And most recently, on March 28, 1955 in *Weber, et al. v. Anheuser-Busch & Co.*, Sup. Ct. of the United States

Advance Sheets No. 97, in setting aside a state court's injunction against picketing and commenting on the nature of the picketing and the law applicable to it, the court said:

"... We do not read this as an unambiguous determination that the IAH's conduct amounted to the kind of mass picketing and overt threats of violence which under the *Allen-Bradley Local* case give the state court jurisdiction...."

In the case before us the picketing and other union measures are of the precise kind that they were in the *Allen-Bradley* strike. It was held there that the state's jurisdiction to enjoin them was not impaired by the National Labor Relations Act. *Allen-Bradley Local v. Wisconsin Employment Relations Board*, *supra*. Neither age nor new legislation have withered the authority of that decision when the facts to which it applied are present, as shown by the foregoing citations. Those facts are repeated now and the action of the state prohibiting them follows that taken in the *Allen-Bradley* matter and approved upon review by the Supreme Court of the United States. We conclude that there has been no ouster of the jurisdiction of the state agencies over the conduct prohibited by the injunction.

The appellants suggest that even though the state's police power may extend to the restraint of the union actions in question here, the state may not exercise that power through the medium of Wisconsin Employment Relations Board dealing with them as unfair labor practices as defined by sec. 111.06 (2) (a and f), Stats. As we understand the argument it is that control of unfair labor practices in interstate commerce has been preempted by Congress and even though the state may deal with the activities in some other way, as crimes or what-not, it may not call them unfair practices, or attempt to deal with them as [fol. 38] such without surrendering jurisdiction over them to the National Labor Relations Board. There is no hint of this in the *Allen-Bradley* opinion or in the *Briggs & Stratton* opinion, *supra*, where, with the approval of the Supreme Court of the United States the state exercised what the federal court recognized as the state's police power through

the medium of the state's Employment Relations Board. One must recognize, also, that the National Labor Relations Board is the creature of a statute and Congress alone confers jurisdiction, whether concurrent or exclusive, on it. If, as the United States court has held, as already noted, Congress did not give the National Board exclusive jurisdiction over the union activities involved here, that Board does not acquire such jurisdiction over them by reason of state action nor, particularly, because a state statute defines as state unfair labor practices conduct which is illegal also on other grounds. We consider Wisconsin is at liberty to use its own legislative discretion in its method of policing such labor relations as these which do not fall within the exclusive jurisdiction conferred by Congress on the National Labor Relations Board.

Next, appellants submit that even if the Wisconsin Employment Relations Board could take jurisdiction of this controversy, make the findings and conclusions which it made, and issue the order commanding the appellants to cease and desist, the circuit court had no jurisdiction to entertain the Board's petition for an enforcement order unless, first, some proceeding was had which established that the Board's order had been disobeyed. The record does not show any such proceeding here. The Board simply went to the circuit court with a petition alleging the appellants' disobedience. But we find no statutory requirement of a jurisdictional pre-requisite such as appellants assert. [fol. 39] Sec. 111.07, Stats., so far as material to the contention, provides:

"(7) If any person fails or neglects to obey an order of the board while the same is in effect the board may petition the circuit court of the county wherein such person resides or usually transacts business for the enforcement of such order and for appropriate temporary relief or restraining order and shall certify and file in the court its record in the proceedings, including all documents and papers on file in the matter, the pleadings and testimony upon which such order was entered, and the findings and order of the board. Upon such filing the board shall cause notice thereof to be served upon such person by mailing a copy to his last known post-office address, and thereupon the court shall have

jurisdiction of the proceedings and of the question determined therein...."

The statute does not expressly require the board to hold a hearing to determine if its order has been violated, nor is the hearing required by implication. A mere administrative decision that the order is not obeyed is sufficient. If the board is satisfied that a violation has taken place it may petition the court for enforcement and shall file its record with the court and give notice, upon which the statute gives the court jurisdiction. These requirements were complied with. We consider that thereby jurisdiction of these proceedings was in the circuit court.

Finally, appellants contend that the evidence does not support the Board's findings. We have read the record. Numerous witnesses, whom it was the right of the Board to believe, testified to the acts of mass picketing, blocking the entrances of the plant, interference with the use of public streets, picketing of homes and intimidation of employes who proposed to work. Exhibits in the way of union publications confirm much of such testimony. Credible and competent evidence in abundance is recorded to support [fol. 40] each of the findings of fact. Sec. 111.07 (7), Stats., declares, then, that such findings shall be conclusive in the circuit court proceeding.

Appellants' brief asserts that the Kohler Company has in its plant a supply of clubs, guns and tear gas, and they submit that it is unjust for the state agencies to restrain the actions of appellants while doing nothing about that. If the condition mentioned by appellants is true, still it has nothing to do with the questions which their brief states are those to be determined by the appeal, namely, (1) the jurisdiction of the Wisconsin Employment Relations Board and the circuit court, and (2) whether the record supports the judgment. If the appellants considered, or do now consider, the presence of these munitions wrongful, as an unfair labor practice, they could, and still can petition the Board for its abatement, exactly as the Kohler Company petitioned for relief from what it deemed to be unfair labor practices on the part of appellants. In the absence of such a petition the question of a Kohler arsenal was not before the Board or the court. In any event, a Board order on that subject would not affect the one actually



made concerning *appellants'* activities. We do not presume to say now that the company may or may not have these articles in its plant but we observe that if wrongs on each side are the subject of petitions by the parties aggrieved both wrongs should be restrained. The absence of a petition concerning one of them does not require that restraint of the one which was protested in the manner and form provided by statute be refused.

In summary, the evidence presented to the Employment Relations Board supports the Board's findings, conclusion and order; the Board had jurisdiction to entertain the pro-[fol. 41] ceeding before it; and the circuit court had jurisdiction to entertain and to grant the petition of the Board for an enforcement order. No abuse of jurisdiction appears. Therefore the judgments of the circuit court must be affirmed.

*By the Court.*—Judgments affirmed.

[fol. 42] IN SUPREME COURT OF WISCONSIN

No. 240

WISCONSIN EMPLOYMENT RELATIONS BOARD, Respondent  
vs.

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ETC., ET AL., Appellants

No. 277

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ETC., ET AL., Appellants

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.,  
Respondents

ORDER DENYING MOTION FOR REHEARING—JUNE 28, 1955

The Court being now sufficiently advised of and concerning the motion of the said appellants, for a rehearing in these causes, it is now here ordered that said motion be, and the same is hereby, denied without costs.

[fol. 43] IN SUPREME COURT OF WISCONSIN

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed Sept. 23, 1955.

# I

Notice is hereby given that United Automobile, Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, UAW-CIO, one of the appellants above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Wisconsin entered on the 28th day of June, 1955, affirming the judgments of the Circuit Court for Sheboygan County confirming and enforcing in No. 240 the order of the Wisconsin Employment Relations Board entered May 21, 1954, and denying in No. 277, the petition of appellants to review and set aside the said order of the Wisconsin Employment Relations Board.

This appeal is taken pursuant to 28 U.S.C.A. Section 1257, subsection (2).

[fol. 44]

# II

The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript, the following:

1. The printed record on the appeals to this Court. (Appendix)
2. The opinion and judgment of this Court.
3. This notice of appeal.

# III

The following question is presented by this appeal:

Whether the State of Wisconsin may regulate conduct of a labor organization affecting interstate commerce

which has been made an unfair labor practice under the National Labor Relations Act, as amended.

Harold A. Craneheld, Attorney for United Automobile, Aircraft & Agricultural Implement Workers of America, CIO, Appellant, 8000 E. Jefferson, Detroit 14, Michigan

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William Quick, David Rabinovitz, Kurt L. Hanslowe, Redmond H. Roche, Jr., Of Counsel

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[fol. 45] SERVICE OF NOTICE OF APPEAL (omitted in printing)

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[fol. 46] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 47] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—January 30, 1956

Appeal from the Supreme Court of the State of Wisconsin.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

January 30, 1956.

(7226-4)

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1955

No. **530**

**UNITED AUTOMOBILE, AIRCRAFT AND AGRICUL-  
TURAL IMPLEMENT WORKERS OF AMERICA,  
AFFILIATED WITH THE CONGRESS OF  
INDUSTRIAL ORGANIZATIONS,**

**UAW-CIO,  
Appellant,**

vs.

**WISCONSIN EMPLOYMENT RELATIONS BOARD  
and KOHLER CO., a Wisconsin corporation,  
Appellees.**

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

**JURISDICTIONAL STATEMENT**

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Wisconsin Supreme Court Rule 6 (2), 240 Wis. viii	9

**Miscellaneous:**

Cox, Federalism in Labor Law, 67 Harv. L. Rev. 1297, 1321 (1954) .....	14
Frankfurter and Greene, The Labor Injunction, Encyclopedia of the Social Sciences (Vol. VIII, p. 653) New York, Macmillan, 1932 .....	14
35 Labor Relations Reference Manual 3032 .....	19
Ratner, Problems of Federal-State Jurisdiction in Labor Relations, 3 Labor L. J. 750, 762 (1952)	14

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1955

No. ....

**UNITED AUTOMOBILE, AIRCRAFT AND AGRICUL-  
TURAL IMPLEMENT WORKERS OF AMERICA,  
AFFILIATED WITH THE CONGRESS OF  
INDUSTRIAL ORGANIZATIONS,**

**UAW-CIO,**

**Appellant,**

**vs.**

**WISCONSIN EMPLOYMENT RELATIONS BOARD  
and KOHLER CO., a Wisconsin corporation,**

**Appellees**

**ON APPEAL FROM THE SUPREME COURT OF WISCONSIN**

**JURISDICTIONAL STATEMENT**

The appellant appeals from a judgment of the Supreme Court of Wisconsin entered on the 3d day of May, 1955, affirming the Circuit Court of Sheboygan County, Wisconsin, enforcing an order of the Wisconsin Employment Relations Board, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## OPINION BELOW

The opinion of the Supreme Court of Wisconsin is reported in 269 Wis. 578, 70 N. W. 2d 191. The opinions of the Circuit Court and the Wisconsin Employment Relations Board are not reported. The opinion of the Supreme Court of Wisconsin is attached hereto as Appendix C. Copies of the opinions, findings of fact, conclusions of law and judgments of the Circuit Court and of the Wisconsin Employment Relations Board are attached hereto as Appendices D and E.

## JURISDICTION

This case was initiated by the filing of a complaint with the Wisconsin Employment Relations Board by the Kohler Company (R. 121)<sup>1</sup> charging appellant (and others) with unfair labor practices within the meaning of the Wisconsin Employment Peace Act (Wisconsin Statutes 1953, Ch. 141, subch. 1). The Wisconsin Board, on May 21, 1954, entered an order finding appellant (and others) guilty of unfair labor practices and directing them to cease and desist from commission of certain practices (R. 113; Appendix E). On petition by the Wisconsin Board for enforcement of and by appellant (and others) to set aside the order, the Circuit Court of Sheboygan County, Wisconsin, enforced the Board's order in an opinion dated August 30, 1954 (R. 101, Appendix D). The judgment enforcing the order

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<sup>1</sup> Record references thus designated refer to page numbers in the brief and appendix filed by appellants in the Supreme Court of Wisconsin which, together with the brief and supplemental appendix filed by appellee Kohler Company will constitute the printed record certified by the Wisconsin court on this appeal.

was entered September 1st, that dismissing the petition to set aside the order on September 9, 1954. The appeals from both judgments were consolidated for hearing in the Supreme Court of Wisconsin, which, on May 3, 1955, entered a single opinion and judgment affirming the Circuit Court of Sheboygan County. A timely motion for rehearing filed on May 21, 1955 was denied on June 28, 1955. Notice of appeal was filed in the Wisconsin Supreme Court on the 23d day of September, 1955. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, U.S. C. Section 1257 (2), since the validity of a state statute on grounds of repugnancy to a law and the Constitution of the United States is drawn in question. The following cases are believed to sustain the jurisdiction of the Supreme Court to review the judgment in this case: *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767; 67 Sup. Ct. 1026; *United Gas, C. & C. Workers v. Wisconsin Employment Relations Board*, 340 U. S. 383; 71 Sup. Ct. 359; *LaCrosse Telephone Company v. Wisconsin Employment Relations Board*, 336 U. S. 18; 69 Sup. Ct. 379; *Hill v. Florida*, 325 U. S. 538; 65 Sup. Ct. 1373; *International Union, U. A. W. A., A. F. of L. Local 232 v. Wisconsin Employment Relations Board, et al.*, 336 U. S. 245; 69 Sup. Ct. 516.

### QUESTIONS PRESENTED

1. Whether the State of Wisconsin, in an unfair labor practice proceeding under its labor statute, the Wisconsin Employment Peace Act, may enjoin conduct of a labor organization affecting inter-state commerce which has been made an unfair labor practice under the National Labor Relations Act, as amended, in view of this Court's admonition (in *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468) that



1  
"a state may not enjoin under its own labor statute conduct which has been made an 'unfair labor practice' under the federal statute".

2. Whether the State of Wisconsin may regulate conduct of a labor organization affecting interstate commerce which has been made an unfair labor practice under the National Labor Relations Act, as amended.

3. Whether the State of Wisconsin may in any manner (except as the enforcement of criminal laws of general applicability may constitute "regulation") regulate conduct of a labor organization affecting interstate commerce which has been made an unfair labor practice under the National Labor Relations Act, as amended.

4. Whether the State of Wisconsin, under its own labor statute or otherwise (except by enforcing its criminal laws of general applicability) may regulate conduct of a labor organization affecting interstate commerce which has been made an unfair labor practice under the National Labor Relations Act, as amended, where the National Labor Relations Board at the time of the State proceeding had asserted and was asserting jurisdiction in representation and unfair labor practice proceedings under the federal statute over the same employer-union relationship.

5. Whether, assuming that only some of the conduct involved is an unfair labor practice under the National Labor Relations Act, as amended, the State of Wisconsin is not obligated to segregate such conduct and limit its regulation to that which is neither protected nor prohibited under the federal act, and then only after a determination by the National Labor Relations Board that the particular conduct involved is not so protected or prohibited.

## STATUTES INVOLVED

### Wisconsin Statutes:

Section 111.04;

Section 111.06 (2)(a)(f);

Section 111.07.

National Labor Relations Act, June 23, 1947, Ch. 120, Title I, Sec. 101, 61 Stat. 136; 29 U. S. C. 151-167:

61 Stat. 140, 29 U. S. C. 157

61 Stat. 140, 29 U. S. C. 158(b)(1)

61 Stat. 146, 29 U. S. C. 160(a)

61 Stat. 146, 29 U. S. C. 160(j)

Texts are set out in Appendices A and B.

## STATEMENT

The appellant, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-CIO, and its Local Union 833, were certified by the National Labor Relations Board as collective bargaining representative of all production workers of the Kohler Company on June 19, 1952. The certification followed a representation proceeding and election conducted by the National Labor Relations Board pursuant to Section 9 of the National Labor Relations Act, as amended. An earlier representation proceeding involving the same parties is reported at 93 NLRB 398.

On February 23, 1953, the appellant and its Local Union 833 UAW-CIO on behalf of the production workers of the Kohler Company executed a collective bargaining agreement which expired March 1, 1954.

Prior to January 1, 1954, pursuant to the requirements of Section 8 (d) of the National Labor Relations Act, as amended, notice was given to the Kohler Company of the intended termination of said contract as of March 1, 1954 (R. 118). In response to that notice of termination and acting under the authority of the National Labor Relations Act, as amended, the Federal Mediation and Conciliation Service intervened and assisted in negotiations for a new contract (R. 119). The parties were unable to reach an agreement for a new contract and on April 5, 1954, the production employees of the Kohler Company went on strike and picketed the premises.

On April 15, 1954, the Kohler Company filed a complaint with the Wisconsin Employment Relations Board, charging appellant (and others) with unfair labor practices within the meaning of the Wisconsin Employment Peace Act, Wisconsin Statutes 1953, Ch. 111, subch. 1 (R. 121). The gist of the complaint was that appellant (and others) had engaged in mass picketing, obstruction of ingress to and egress from the plant, violence and threats of violence all in contravention of the Wisconsin labor statute. The answer to the complaint challenged the jurisdiction of the Wisconsin Employment Relations Board to proceed with the hearing, on the ground that the National Labor Relations Board had exclusive jurisdiction over the subject matter (R. 125-126).

After hearing, which ended on May 19, 1954, the Wisconsin Employment Relations Board entered an order on May 21, 1954, finding appellant (and others) guilty of unfair labor practices within the meaning of the Wisconsin Employment Peace Act. The Board concluded that appellant (and others) had:

“... \* violated Section 111.06 (2)(a) of the Wisconsin Statutes by picketing the domicile of persons

desiring to work at the Kohler Company, and Section 111.06 (2) (f) of the Wisconsin Statutes by hindering and preventing persons desiring to be employed by the Kohler Company by means of massed picketing and by means of obstructing and interfering with entrance to and egress from the plant of the Kohler Company and by obstructing and interfering with the free and uninterrupted use of the public roads, streets and highways" (R. 115).

On August 30, 1954, the Circuit Court of Sheboygan County, Wisconsin, entered an opinion (R. 101, Appendix D) on a petition by the Wisconsin Employment Relations Board dated May 25, 1954 (R. 109-112) for enforcement of and on a petition by appellant (and others) for review of the order. The Court enforced the Board's order as against appellant's contention that the subject matter of the proceeding was pre-empted by the National Labor Relations Act, as amended, and that the National Labor Relations Board had exclusive jurisdiction, and that the Wisconsin tribunals accordingly were without jurisdiction over the subject matter. The Court specifically dealt with these contentions in its opinion (R. 103, 104, Appendix D).

Appeal was taken to the Supreme Court of Wisconsin which on the 3d day of May, 1955, after consolidated hearing rendered a single opinion and judgment affirming both judgments (on the two petitions) of the Circuit Court for Sheboygan County. A motion for rehearing was denied on June 28, 1955. The Supreme Court of Wisconsin addressed a major part of its opinion to the contention, again advanced, that the State of Wisconsin was without jurisdiction in these proceedings for the reason that "federal labor legislation has pre-empted the field and the National Labor Relations Board has exclusive jurisdiction over this controversy which grows out of and affects labor relations". (Appendix C.)



Throughout the period involved the National Labor Relations Board has continued to exercise its jurisdiction over the labor relations of the Kohler Company in the following several proceedings:

On charges filed on November 2, 1951 and May 5, 1952 by individual employees and also on May 5, 1952 by an independent labor organization which later affiliated with appellant, the National Labor Relations Board issued a consolidated complaint and, on April 12, 1954, filed a decision and order finding the Kohler Company guilty of unfair labor practices within the meaning of Section 8 of the National Labor Relations Act, as amended, 108 NLRB 207. This decision was enforced on March 7, 1955 (re-hearing denied April 7) by the United States Court of Appeals for the Seventh Circuit in a decision reported at 220 F. 2d 3.

Furthermore, on October 26, 1954, the National Labor Relations Board issued a further complaint charging the Kohler Company with unfair labor practices within the meaning of the federal statute. Hearings on this complaint, which is case #13-CA-1780, commenced in February, 1955 and are continuing.

The Supreme Court of Wisconsin in its decision took cognizance of these proceedings and of the continuing exercise of jurisdiction by the federal board over the labor relations of the Kohler Company (both in the representation case and in the unfair labor practice proceedings).<sup>2</sup>

<sup>2</sup> Although no record of the current and continuing unfair labor practice proceeding by NLRB against Kohler Company is included in the record in this appeal, that proceeding is a public record and we believe we may with propriety advise the Court that all of the acts and conduct from which appellant was enjoined by the Wisconsin Employment Relations Board are pleaded by appellee, Kohler Company, in defense of the NLRB complaint and in justification for its own conduct charged as unfair labor practices under the National Labor Relations Act and that proof of all such acts and conduct has already been received by the Trial Examiner of NLRB and is presently part of the record in that continuing proceeding.

### How the Federal Question is Presented.

The federal question was raised in the first instance before the Wisconsin Employment Relations Board by written answer to the complaint challenging in Paragraphs 1 and 2 the jurisdiction of the Wisconsin Employment Relations Board, on the ground that the National Labor Relations Board had exclusive jurisdiction over the subject matter (R. 125-126).

It was raised in the Circuit Court of Sheboygan County by written answer to the petition for enforcement (R. 118-120). Repugnancy of the proposed construction of the Wisconsin Employment Peace Act to the federal labor statute (and by implication to the Commerce and Supremacy clauses of the United States Constitution) was specifically urged. It was also raised in the petition of appellant (and others) for review filed in the Circuit Court (*dehors* the Record but noted in the opinions filed by both the Circuit and the Supreme Court; Appendices D and C).

The federal question was again presented in the Wisconsin Supreme Court in accordance with that Court's Rule 6 (2), 240 Wis. viii, the material part of which reads:

"The question or questions involved on appeal or writ of error shall be stated briefly without detail or discussion, without names, dates, amounts, or particulars of any kind. Following each question there shall be a statement indicating whether the question was affirmed, negated, qualified, or unanswered by the court below."

The federal question was raised before the Supreme Court of Wisconsin in accordance with this rule (R. 2). It was renewed in the Motion for Rehearing. A major portion of the opinion of the Supreme Court was addressed to

the question of state as against federal jurisdiction (Appendix C pages 9a through 14a).

In each of these state tribunals the jurisdiction of the Wisconsin Employment Relations Board was upheld and the contention of appellant that such a construction of the Wisconsin Employment Peace Act was repugnant to the National Labor Relations Act, as amended, was denied.

### THE QUESTIONS ARE SUBSTANTIAL

Wisconsin in this case purported under its own labor statute to regulate conduct affecting interstate commerce, which has been made an unfair labor practice under the National Labor Relations Act, as amended. This is in direct conflict with principles enunciated in *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468; 75 Sup. Ct. 480; *Garner v. Teamsters Union*, 346 U. S. 485; 74 Sup. Ct. 161; *General Drivers v. American Tobacco Co.*, 348 U. S. 978; 75 Sup. Ct. 569; *Plankinton Packing Company v. Wisconsin Employment Relations Board*, 338 U. S. 953; 70 Sup. Ct. 491; *Building Trades Council v. Kinard Construction Company*, 346 U. S. 933; 74 Sup. Ct. 373. Insofar as state regulation of such conduct under a state labor statute still appears justifiable in light of this Court's decisions in *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740; 62 Sup. Ct. 820 and *International Union v. Wisconsin Employment Relations Board*, 336 U. S. 245; 69 Sup. Ct. 516, these earlier decisions should be reconsidered and reinterpreted. We believe such re-interpretation was in fact expressly announced by this Court in the *Garner* and *Anheuser-Busch* decisions, *supra*. Consequently, the decision below is in conflict with *Allen-Bradley Local v. Wisconsin Employment Relations Board* and *International Union v. Wisconsin Employment Rela-*

tions Board (the so-called *Briggs Stratton* case) as well. In any event an important question in federal-state relations regarding industrial controversies is presented by this case.

\* \* \*

The general principles of *federal pre-emption* under the Commerce and Supremacy Clauses, both as they apply to labor relations and otherwise, are so well established as to require but briefest reiteration. Where Congress has taken a field in hand and indicated the substantive and adjective law for its regulation, the states may not regulate the same field in duplication or complementation of, or in opposition to, the federal law. *Houston v. Moore*, 5 Wheat. 1, 20-23 (1820); *Charleston & Carolina Railroad v. Varnville Co.*, 237 U. S. 597, 604; 35 Sup. Ct. 715; *Missouri Pacific Railroad Co. v. Porter*, 273 U. S. 341, 345, 346; 47 Sup. Ct. 383, 384, 385.

These principles were recently given sweeping application when this Court reversed *per curiam* and without opinion a decision of the Kentucky Court of Appeals. That court, in *Drivers Union v. American Tobacco Co.*, 264 S. W. 2d 250, upheld an injunction restraining conduct characterized by the state court:

“\* \* \* as a violation of the common law, the constitutional law and the statutory law of Kentucky. More than that, the illegal conduct of the employees could subject them to criminal prosecution.”

This court reversed, citing *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468; 75 Sup. Ct. 480, and *Bus Employees v. Wisconsin Employment Relations Board*, 340 U. S. 383; 71 Sup. Ct. 359. We conclude the state was held without jurisdiction whatever to regulate such conduct for the reason it was, if not protected by the National Labor Re-





It follows that the action of the state in this case flies directly in the teeth of well established principles of federal pre-emption of and exclusive federal jurisdiction over labor relations affecting commerce. This is particularly true as Wisconsin in this case sought to proceed under its own labor statute. It was pointed out in *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468; 75 Sup. Ct. 480, 484 that:

"A state may not enjoin under its own labor statute conduct which has been made an 'unfair labor practice' under the federal statute."

Wisconsin here did precisely what this Court said it may not do; namely, proceed *under its own labor statute* to enjoin conduct prohibited as an unfair labor practice by the National Labor Relations Act, as amended. Indeed, as we construe the *per curiam* reversal in *General Drivers v. American Tobacco Co.*, 348 U. S. 978; 75 Sup. Ct. 569, the state is now *totally* precluded from regulating in *any manner* such conduct. For the conduct there held to be pre-empted was a violation of the constitutional, common, statutory and criminal law of Kentucky.

Even if the *American Tobacco* decision, *supra*, does not support the proposition stated above, it may be argued, indeed, it may for purposes of this case, be conceded (although we do not), that the particular vice which must here be corrected is the attempted enforcement of *labor policy* by the state in duplication and complementation of and possible conflict with the federal labor policy. Merely

\* Citing *Garner v. Teamsters Union*, 346 U. S. 485; 74 Sup. Ct. 161; *Plankinton Packing Co. v. WERB*, 338 U. S. 953; 70 Sup. Ct. 491; *Building Trades Council v. Kinard Construction Corp.*, 346 U. S. 933; 74 Sup. Ct. 373.

to hold this impermissible would leave the state still free to enforce its criminal laws; common law (of torts, for example), and equity jurisdiction of *general* applicability with regard to the conduct involved. This distinction has been suggested by a number of commentators.<sup>5</sup> It is also implied in the case of *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656; 74 Sup. Ct. 833, which decision allowed recovery of damages in a common law tort action for the reason that no compensatory or administrative relief was available under the federal statutes although the conduct involved was also an unfair labor practice under the Taft-Hartley Act.

We suggest the distinction so drawn is on deeper consideration not tenable. The form taken by attempted state regulation of federally controlled conduct should not, it seems to us, substantially affect the application of the pre-emption doctrine the purpose of which it is to avoid possible conflict with the federal law. And it is unrealistic to say that a state, in applying its common law or equity jurisdiction, is *not* enforcing labor policy in the sense of affecting the balance in a labor dispute. The abuse of equity jurisdiction and of the injunction in a labor relations context (in the absence of anti-injunction statutes imposing true equitable standards on the judiciary) is notorious. Frankfurter and Greene, *The Labor Injunction*, Encyclopedia of Social Sciences, 1932, Vol. VIII, p. 653 (Macmillan, N. Y.). Common law tort actions arising out of labor disputes tend to be characterized by the imposition of so-called punitive damages in staggering

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<sup>5</sup> Cox, *Federalism in Labor Law*, 67 Harv. L. Rev. 1297, 1321 (1954); Ratner, *Problems of Federal State Jurisdiction in Labor Relations*, 3 Labor L. J. 750, 762 (1952).

amounts.<sup>9</sup> Indeed, we respectfully suggest reconsideration of the *Laburnum* decision is warranted. Congress has in Sections 301 and 303 of the Taft-Hartley Act (29 U. S. C. sections 185 and 187) set forth provisions for damage actions which seem to us to indicate the extent to which it meant to make that remedy available in labor relations matters affecting interstate commerce. The comprehensive scheme of regulation of labor relations affecting commerce embodied in the Labor Management Relations Act, 1947, would seem to leave no authority in the state over any conduct within the reach of that Act beyond the ordinary exercise of "police power" for the maintenance of the public peace.

There can, in any event, be no doubt here that Wisconsin has sought "under its own labor statute [to enjoin] conduct which has been made an 'unfair labor practice' under the federal statutes." (Italics added.) This is in direct contravention of the holding in the *Garner* case, the key element of which was characterized in *Weber v. Anheuser-Busch*, as follows:

"In *Garner* the emphasis was not on two conflicting labor statutes but rather on two similar remedies, one state and one federal, brought to bear on precisely the same conduct."

<sup>9</sup> Judgments against appellant have been entered in the Circuit Court for Morgan County, Ala., in common law tort actions founded on prevention (by mass picketing) of access by plaintiff to his place of employment and in part on simple assault or on assault and battery in amounts exceeding by many thousands of dollars the actual damages claimed. *Russell v. UAW*, Docket No. 6149, judgment for \$10,000; *Palmer v. UAW*, Docket No. 6152, judgment for \$18,450; both cases pending on appeal to the Supreme Court of Ala. See also *Russell v. UAW*, 258 Ala. 614; 64 So. 2d 384, reversing trial court's order dismissing on grounds of exclusive federal jurisdiction.

<sup>1</sup> It was stated in *Garner*: "The conflict lies in remedies, not rights."



Heavy reliance is placed by the Wisconsin Supreme Court (and will undoubtedly be placed by appellees) on *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 62 Sup. Ct. 820, and on *International Union v. Wisconsin Employment Relations Board*, 336 U. S. 245, 69 Sup. Ct. 516, to justify the state's jurisdiction to regulate, as was done here, the conduct involved. The foregoing considerations, based as they are, on this Court's most recent pronouncements in this field, require a reinterpretation of those earlier decisions. Indeed, we believe such a reinterpretation has already been given, at least in part. We shall here seek to highlight it.

*Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 62 Sup. Ct. 820, is cited for the proposition that the states continue free to enjoin mass picketing, threats of violence, property damage, obstruction of public roads, etc. However, it must be emphasized that that case was decided long *before* the Taft-Hartley amendments to the National Labor Relations Act prohibited such conduct as union unfair labor practices. *Hill v. Florida*, 325 U. S. 538, 65 Sup. Ct. 1373, recognized this in pointing out that the basis for the decision in *Allen-Bradley* was that the Wagner Act did *not* regulate mass picketing, threats of violence, and similar conduct.\* This Court's most recent decisions point out this same crucial fact. Thus, Justice Frankfurter, speaking for the Court in *Anheuser-Busch* explains the *Allen-Bradley* decision as follows:

"The Court held that such conduct was not subject to regulation by the federal Board, either by prohibition or by protection."

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\* "Certain conduct, such as mass picketing, threats, violence, and related actions, we held [in *Allen-Bradley*] were not governed by the Wagner Act, and hence Wisconsin was free to regulate them." *Hill v. Florida*, 325 U. S. 538, 539, 65 Sup. Ct. 1373, 1374.

But now "such conduct" is subject to prohibition by the federal Act and Board. And according to *Garner* the states may, under *Allen-Bradley*, exercise "historic powers" over "traditional" matters such as public safety and order, etc.<sup>9</sup> An administrative unfair labor practice proceeding would hardly seem to fit this description. The fact that state courts enforced the administrative order does not alter this fact. This is made especially clear by those courts' refusal to invoke such "traditional" and "historic" principles as the doctrine of clean hands in this case. We submit *Allen-Bradley v. Wisconsin Employment Relations Board, supra*, when read in light of this Court's later declarations, no longer supports the position of the court below.

The same is also true of *International Union v. Wisconsin Employment Relations Board*, 336 U. S. 245, 69 Sup. Ct. 516 (the so-called *Briggs-Stratton* case). In that case state jurisdiction was upheld for the reason the union conduct involved was neither protected by the federal Act nor forbidden by it.<sup>10</sup> This alone makes the decision inapplicable here. For the conduct here involved is prohibited by the federal Act.

Beyond this, there is, we submit a possibility that the *Briggs-Stratton* case was incorrectly decided in that the conduct there involved may have constituted violation of Section 8 (b)(3) of the Taft-Hartley Act and therefore, was "governable" by the federal board. Some support for this may be found in decisions of the National Labor

<sup>9</sup> We have already indicated our respectful disagreement with this view which would distinguish among various modes for exercise of the states' regulatory efforts. In any case, "historic" powers were not employed in this case.

<sup>10</sup> It was said there the conduct either is "governable by the State or it is entirely ungoverned."

Relations Board, to wit: *Pacific Telephone Company*, 107 NLRB 1547, and *Textile Workers, CIO*, 108 NLRB 743. The difficulty of this question is revealed by the fact that the Board's decision in the last named case was recently reversed in *Textile Workers Union v. NLRB*, 36 Labor Relations Reference Manual, 2778,<sup>11</sup> decided by the Court of Appeals for the District of Columbia on October 27, 1955. The court in over-ruling the Board's interpretation of the statute specifically relied on the *Briggs-Stratton* decision. "This Court's *prejudging* of such issues (following determination by state tribunals but without prior National Labor Relations Board proceedings) supports our further contention that the states must be prohibited from assertion of jurisdiction except following a National Labor Relations Board determination that *none*, or only *some* of the conduct involved is either protected or prohibited by the federal Act."<sup>12</sup> Only thus can the benefits of the orderly system of adjudication by an expert Board envisioned by Congress be preserved. "We do not think that a case by case test of federal supremacy is permissible here." (*Bethlehem Co. v. State Board*, 330 U. S. 767, 776; 67 Sup. Ct. 1026, 1031.) "Congress has occupied this field and closed it to state regulation." (*Automobile Workers v. O'Brien*, 339 U. S. 454, 457; 70 Sup. Ct. 781, 783). En-

<sup>11</sup> The official citation was not available to appellant at time of writing.

<sup>12</sup> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order." (*Garner v. Teamsters Union*, 346 U. S. 485, 490, 74 Sup. Ct. 161, 165.)

"The point is rather that the Board, and not the state court, is empowered to pass upon such issues in the first instance." (*Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468; 75 Sup. Ct. 480, 486.)

lightened state courts have indeed recognized and accepted these principles. *Busch and Sons, Inc. v. Retail Union*, 15 N. J. 226; 104 A. 2d 448 (1954). This is not to say, of course, that frivolous and dilatory pleas of federal jurisdiction require dismissal of the state proceeding.

These principles seem especially apt for a labor relationship clearly affecting commerce and already, in a large part of its aspects, subject to active federal regulation, as is the case here. The evils of confusion, conflict, and duplication which the pre-emption doctrine is intended to prevent become glaringly apparent when it is considered that the decision below envisions simultaneous exercise of jurisdiction by the National Labor Relations Board and the Wisconsin Employment Relations Board in unfair labor practice proceedings in the same labor dispute—a fact which the court below was aware of.

The questions respecting jurisdiction of the state involved in this appeal are of national concern. Numerous states have enacted labor statutes containing provisions similar to those in the Wisconsin Act (as well as the National Labor Relations Act, as amended) thus inviting the same federal-state conflict present in the instant case.<sup>13</sup>

Furthermore, instances of attempted regulation by the states of conduct which is also an unfair labor practice prohibited by the National Labor Relations Act, as amended, by means of common and criminal law and ex-

<sup>13</sup> See compilation of state statutes at 35 Labor Relations Reference Manual 3032. A concrete illustration of virtually the same conflict between state and federal jurisdiction presented by the instant case is found in *McQuay, Inc., v. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO*, — Minn. —, 72 N. W. 2d 81. Appellant herein is also preparing to appeal the last named decision which arises under the Minnesota Labor Relations Act.



ercise of equity jurisdiction are, of course, legion. We have pointed out how these problems are involved in certain aspects of this appeal. We submit the authority of the states in all these regards is in need of definitive settlement.

We therefore believe the questions presented by this appeal to be substantial and of public importance.<sup>14</sup>

Respectfully submitted,

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<sup>14</sup> If it is deemed by the Court that the decision below constitutes a denial of asserted federal rights rather than a validation of the state statute as against the contention of its repugnancy to the Constitution and laws of the United States, it is respectfully urged that by reason of the importance of the questions involved, the Court deem the present jurisdictional statement to be in the nature of an application for certiorari under 28 U. S. C., Section 1257 (3), and such application be entertained. 28 U. S. C., Section 2103. *Charleston Federal Savings and Loan Association, et al. v. Alderson*, 324 U. S. 182, 187; 65 Sup. Ct. 624, 628. In this connection, the Court's attention is respectfully drawn to the order entered by Associate Justice Harold A. Burton on September 19, 1955 on appellant's application, extending time within which to petition for certiorari to and including, November 25, 1955.

## APPENDIX A

### WISCONSIN STATUTES 1953

#### Section 111.04 (page 1905):

"111.04 *Rights of employees.* Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

#### Section 111.06 (2) (a) (f) (page 1907):

"(2) It shall be an unfair labor practice for an employee individually or in concert with others:

(a) to coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family.

(f) To hinder, or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

#### Section 111.07 (page 1908):

"111.07 *Prevention of unfair labor practices.* (1) Any controversy concerning unfair labor practices may be submitted to the board in the manner and with the effect provided in this subchapter, but nothing herein shall prevent the pursuit of legal or equitable relief in court of competent jurisdiction."

## APPENDIX B

NATIONAL LABOR RELATIONS ACT,  
61 STAT. 140 ff, 29 U. S. C.

Section 157, Section 158 (b)(1), Section 160 (a) and (j):

"Sec. 157. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

"Sec. 158 (b). It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances;"

"Section 160 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over

any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith."

"Section 160 (j). The Board shall have power, upon issuance of a complaint as provided in subsection (h) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper."



## APPENDIX C

## OPINION OF THE SUPREME COURT OF WISCONSIN

Nos. 240 and 277

August Term, 1954

## STATE OF WISCONSIN: IN SUPREME COURT

Wisconsin Employment Relations Board,  
Respondent,

v.

United Automobile, Aircraft and Agri-  
cultural Implement Workers, etc.,  
Appellants.

United Automobile, Aircraft and Agri-  
cultural Implement Workers of Ameri-  
ca, etc., et al.,

Appellants,

v.

Wisconsin Employment Relations Board;  
et al.,

Respondents.

Appeals from two judgments of the circuit court for Sheboygan county: Arold F. Murphy, Circuit Judge, presiding. *Affirmed.*

A judgment entered September 1, 1954, enforced an order of the Wisconsin Employment Relations Board, dated May 21, 1954. A judgment entered September 9, 1954 dismissed appellants' petition for a review of the same order. The appeals from the respective judgments have been consolidated.

The Kohler Company produces and markets articles in interstate commerce. Local Union 833 UAW-CIO is the exclusive bargaining agent of the production workers of the Kohler Company, duly certified to be such by the National Labor Relations Board. The contract between the company and the union expired March 1, 1954, and negotiations between the parties for a new contract, in which the Federal Mediation and Conciliation Service participated, proved fruitless. The production employees began a strike against the company April 5, 1954. At that time the National Labor Relations Board had under consideration a complaint by the union charging the company with the commission of certain unfair labor practices in 1951 and 1952. The Board decided these adversely to the company on April 12, 1954, the company appealed to the federal courts and that appeal is pending. The National Board also has under consideration another complaint charging the company with other unfair labor practices in which, as yet, it has not reached a decision.

As soon as the strike began, the unions, through their officers and members, established a picket line around the company's premises and by various means dissuaded or prevented persons wishing to work from entering the plant. The company complained of the conduct of the pickets to the Wisconsin Employment Relations Board, alleging that the organizations and individuals named in the complaint were thereby guilty of unfair labor practices. That Board conducted a hearing on the complaint and on May 21, 1954 made findings of fact that the officers, members and agents of the union and certain named individuals had been and were then (1) engaged in mass picketing at the entrance to the plant of the Kohler Company; (2) that they have attempted to prevent the lawful work or employment of persons desiring to work for the Kohler Company by force, threats and intimidation and

by massing pickets at the plant entrances; (3) that the large numbers and mass formations around the entrances obstruct and interfere with the free use of public streets; and (4) that the officers, members and agents of the union have forcefully taken into custody persons attempting to enter the plant of the Kohler Company, forced them to accompany such officers; members and agents to the strike headquarters of the respondent union and prevented them from pursuing their lawful work and employment. That in addition officers, members and agents of the respondent union have followed the cars of persons attempting to enter or leave the Kohler Company plant and picketed their homes and have threatened the persons desiring to work with physical injury.

Upon these findings of fact the Board made its conclusions of law declaring that the officers, members and agents of the local and international unions and the named individuals have violated sec. 111.06.(2) (a) and (f), Stats., by the conduct described in the findings of fact, and the Board then issued its order commanding the organization and natural persons to cease and desist from such conduct. The Board's order also directed the following affirmative action:

**"IT IS FURTHER ORDERED** that the Respondent Unions, their officers, members and agents take the following affirmative action

"1. Limit the number of pickets around the Kohler Company premises to a total of not more than 200, with not more than 25 at any one entrance. Such pickets are to march in single file and to at all times maintain a space at least 20 feet in width at each entrance to the Kohler Company premises over which pickets will not pass and on which persons either on foot or in conveyance may freely enter or leave the premises without interference."

The statutory provisions which the Employment Relations Board concluded had been violated read:

"111.06 (2). It shall be an unfair labor practice for an employe individually or in concert with others:

"(a) To ~~coerce~~ or intimidate an employe, in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

\* \* \*

"(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

The Board's order was entered May 21, 1954. On May 25, 1954 the Board petitioned the circuit court alleging that the organizations and persons affected by its order had refused to obey it but were continuing to engage in the conduct which the order prohibited. Other jurisdictional facts were alleged in the petition and the Board demanded a judgment and decree of enforcement. The unions and natural persons responded by denying their violation of the Board's order and, further, alleged that the Company is engaged in interstate commerce, that the Wisconsin Employment Relations Board is without jurisdiction to hear and determine the issues which it here attempts to determine because the field of labor-management relations with which the Board attempts to deal has been preempted by Congress through the enactment of the Labor-Management Relations Act of 1947, as amended,



(the Taft-Hartley Act) and jurisdiction in the premises exists exclusively in the National Labor Relations Board. The answer also alleged that the circuit court was without jurisdiction to enforce the Wisconsin Board's order because of the federal preemption of the field; and it denied that the findings of fact made by the Wisconsin Board were supported by credible competent evidence.

The circuit court rendered a written decision August 30, 1954 determining each issue favorably to the petition of the Wisconsin Employment Relations Board and on September 1, 1954 it entered judgment confirming the order of the Board and, by an injunction, decreed enforcement of that order. The injunction directed that the Union, their officers, members and agents

"A. Immediately cease and desist from:

"1. Coercing and intimidating any person desiring to be employed by the Kohler Company in the enjoyment of his legal rights, intimidating his family, picketing his domicile, or injuring the person or property of such persons or his employe.

"2. Hindering or preventing by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of lawful work or employment by any person desirous of being employed by the Kohler Company.

"3. Obstructing or interfering in any way with entrance to and egress from the premises of the Kohler Company.

"4. Obstructing or interfering with the free and uninterrupted use of public roads, streets, highways, railways or private drives leading to the premises of the Kohler Company.

"B. Take the following affirmative action:

"1. Limit the number of pickets around the Kohler Company premises to a total of not more

than 200, with not more than 25 at any one entrance. Such pickets are to march in single file and to at all times maintain a space at least 20 feet in width at each entrance to the Kohler Company premises over which pickets will not pass and on which persons either on foot or in conveyance may freely enter or leave the premises without interference."

The unions and individuals enjoined have appealed from the judgment.

Brown, J. The conduct which the Wisconsin Employment Relations Board found to be a violation of sec. 111.06, Stats., as unfair labor practices, is virtually the same conduct as that which it had found to be a similar violation in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board* (1941), 237 Wis. 164, 295 N. W. 791. The present order and injunction are essentially the same as those issued by the Board and the court in the *Allen-Bradley Case*. The principal attack on it then, like the attack on the present order, was made on the ground that federal labor legislation has preempted the field and the National Labor Relations Board has exclusive jurisdiction over this controversy; which grows out of and affects labor relations. The enforcement order issued by the circuit court in the *Allen-Bradley Case* in all substantial particulars is the same as the one issued by the circuit court in the case at bar. We sustained the circuit court and the Board on such jurisdictional questions and on their exercise of the jurisdiction and we were affirmed by the Supreme Court of the United States in *Allen-Bradley-Local v. Board*, 315 U. S. 740, 86 L. Ed. 1154.

As the facts of the present matter so closely parallel the *Allen-Bradley* facts there would be little cause to do more than affirm the judgment of the circuit court on the authority of *Allen-Bradley* except for a distinction to which

appellants call attention, namely, that the Federal Labor Act has been amended since, in *Allen-Bradley*, the United States Supreme Court held that it did not deprive the state of jurisdiction under such circumstances. Appellants' argument is that the United States' court was then construing the National Labor Relations Act (the Wagner Act), which concerned itself only with unfair labor practices on the part of employers and thus left employees' practices to be controlled by the states; but that Act was amended in 1947 by the National Labor-Management Relations Act (the Taft-Hartley Act), which does define and discipline unfair labor practices by employees. Therefore, appellants assert, even though *Allen-Bradley* may have been right in its day, the present legislation, by bringing employees' labor practices within its scope, ousts state control and confers exclusive jurisdiction over them in the National Labor Relations Board.

The authoritative interpretation of federal statutes rests in the federal courts and their highest court does not agree with appellants' contention that the Taft-Hartley Act has taken from the states jurisdiction over such manifestations of labor relations as mass picketing, intimidation and obstruction of streets. In cases arising under Taft-Hartley the United States Supreme Court continued to cite *Allen-Bradley* to illustrate the circumstances in which the state authority may still operate. Thus, in *International Union v. Wisconsin Employment Relations Board* (1949), 336 U. S. 245, 93 L. Ed. 654, which was first before this court and is reported in 250 Wis. 550 (the Briggs & Stratton case), the state court enjoined recurrent and unannounced work stoppages designed to put pressure on the employer. The injunction was issued while the Wagner Act was in effect but the restraint continued after that act was superseded by Taft-Hartley. The Supreme Court of the United

States therefore declared that it considered the state action in relation to both Federal Acts. And it said:

“ \* \* \* However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Relations Act of 1947, that ‘Congress designedly left open an area for state control’ and that ‘the intention of Congress to exclude States from exercising their police power must be clearly manifested.’ (Citing *Allen-Bradley*.) We therefore turn to its legislation for evidence that Congress has clearly manifested an exclusion of the state power sought to be exercised in this case.”

So turning, the court found no such evidence and it said:

“ \* \* \* While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states. \* \* \*

“It seems clear to us that this case falls within the rule announced in *Allen-Bradley*. \* \* \*

More recently the court has declared the same principle, crediting it to the same source. Thus in *Garner v. Teamsters Union* (1953), 346 U. S. 485 98 L. Ed. 228, the employer sought to enjoin peaceful picketing by state action. The United States Supreme Court, distinguishing the situation from that in *Allen-Bradley*, said (98 L. Ed. 228, 238):

“This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is ‘governable by the State or it is entirely ungov-



erned.' In such cases we have declined to find an implied exclusion of state powers. *International Union, U. A. W. v. Wisconsin Employment Relations Board*, 336 U. S. 245, 254, 93 L. ed. 651, 663, 69 S. Ct. 516. Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways; or picketing homes. We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.' *Allen-Bradley Local, U. E. R. M. W. v. Wisconsin Employment Relations Board*, 315 U. S. 740, 749, 86 L. ed. 1154, 1164, 62 S. Ct. 820. (Our italics.)"

Still more recently, in *United Workers v. Laburnum Corp.* (1954), 347 U. S. 656, 98 L. Ed. 1025, the court repeated the language just quoted from the *Garner Case*, again giving credit to *Allen-Bradley*.

And most recently, on March 28, 1955 in *Weber et al. v. Anheuser-Busch, Inc.*, Sup. Ct. of the United States, Advance Sheets No. 97; in setting aside a state court's injunction against picketing and commenting on the nature of the picketing and the law applicable to it, the court said:

"\* \* \* We do not read this as an unambiguous determination that the IAM's conduct amounted to the kind of mass picketing and overt threats of violence which under the *Allen-Bradley Local* case give the state court jurisdiction. \* \* \*

In the case before us the picketing and other union measures are of the precise kind that they were in the *Allen-Bradley* strike. It was held there that the state's jurisdiction to enjoin them was not impaired by the National Labor Relations Act. *Allen-Bradley Local v. Wisconsin Employment Relations Board*, *supra*. Neither age nor new legislation have withered the authority of that



statute defines as state unfair labor practices conduct which is illegal also on other grounds. We consider Wisconsin is at liberty to use its own legislative discretion in its method of policing such labor relations as these which do not fall within the exclusive jurisdiction conferred by Congress on the National Labor Relations Board.

Next, appellants submit that even if the Wisconsin Employment Relations Board could take jurisdiction of this controversy, make the findings and conclusions which it made, and issue the order commanding the appellants to cease and desist, the circuit court had no jurisdiction to entertain the Board's petition for an enforcement order unless, first, some proceeding was had which established that the Board's order had been disobeyed. The record does not show any such proceeding ~~here~~. The Board simply went to the circuit court with a petition alleging the appellants' disobedience. But we find no statutory requirement of a jurisdictional pre-requisite such as appellants assert.

Sec. 111.07, Stats., so far as material to the contention, provides:

"(7) If any person fails or neglects to obey an order of the board while the same is in effect the board may petition the circuit court of the county wherein such person resides or usually transacts business for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court its record in the proceedings, including all documents and papers on file in the matter, the pleadings and testimony upon which such order was entered, and the findings and order of the board. Upon such filing the board shall cause notice thereof to be served upon such person by mailing a copy to his last known post-office address, and thereupon the court shall have jurisdiction of the proceedings and of the question determined therein. • • •"

The statute does not expressly require the board to hold a hearing to determine if its order has been violated, nor is the hearing required by implication. A mere administrative decision that the order is not obeyed is sufficient. If the board is satisfied that a violation has taken place it may petition the court for enforcement and shall file its record with the court and give notice, upon which the statute gives the court jurisdiction. There requirements were complied with. We consider that thereby jurisdiction of these proceedings was in the circuit court.

Finally, appellants contend that the evidence does not support the Board's findings. We have read the record. Numerous witnesses, whom it was the right of the Board to believe, testified to the acts of mass picketing, blocking the entrances of the plant, interference with the use of public streets, picketing of homes and intimidation of employees who proposed to work. Exhibits in the way of union publications confirm much of such testimony. Credible and competent evidence in abundance is recorded to support each of the findings of fact. Sec. 111.07 (7), Stats., declares, then, that such findings shall be conclusive in the circuit court proceeding.

Appellants' brief asserts that the Kohler Company has in its plant a supply of clubs, guns and tear gas, and they submit that it is unjust for the state agencies to restrain the actions of appellants while doing nothing about that. If the condition mentioned by appellants is true, still it has nothing to do with the questions which their brief states are those to be determined by the appeal, namely, (1) the jurisdiction of the Wisconsin Employment Relations Board and the circuit court, and (2) whether the record supports the judgment. If the appellants considered, or do now consider, the presence of these munitions wrongful, as an unfair labor practice, they could, and



still can petition the Board for its abatement, exactly as the Kohler Company petitioned for relief from what it deemed to be unfair labor practices on the part of appellants. In the absence of such a petition the question of a Kohler arsenal was not before the Board or the court. In any event, a Board order on that subject would not affect the one actually made concerning *appellants'* activities. We do not presume to say now that the company may or may not have these articles in its plant but we observe that if wrongs on each side are the subject of petitions by the parties aggrieved both wrongs should be restrained. The absence of a petition concerning one of them does not require that restraint of the one which was protested in the manner and form provided by statute be refused.

In summary, the evidence presented to the Employment Relations Board supports the Board's findings, conclusion and order; the Board had jurisdiction to entertain the proceeding before it; and the circuit court had jurisdiction to entertain and to grant the petition of the Board for an enforcement order. No abuse of jurisdiction appears. Therefore the judgments of the circuit court must be affirmed.

*By the Court.*—Judgments affirmed.

## APPENDIX D

---

### OPINION AND DECISION OF THE CIRCUIT COURT

#### Title and Venue

Two separate proceedings are before the Court under two different titles. The first filed was initiated by a petition filed by the Wisconsin Employment Relations Board against two unions and their officers, members of the union, and several named individual respondents. The second proceedings is upon the petition of both unions against the Wisconsin Employment Relations Board and the Kohler Company as respondents, seeking a review of the proceedings from which the order emanated and was filed, and asking for a reversal of the order and a dismissal of the complaint of the Kohler Company. This memorandum decision, of course, must relate to both proceedings.

I believe that it will be agreed by anyone who has made even a casual study of Chapter 111 of the Wisconsin Statutes and the cases that have construed that Act during the years, that the inquiry before this Court in the first proceedings, asking for a judgment of enforcement of the order of the Board, gives to the Court a very limited area and the inquiry is very confined.

This Court sits now as an appellate court to review the proceedings had before the Board and to pass upon the question of whether errors of law were committed by the Board in exercising the jurisdiction that the Statutes vest the Board with. The Court is not authorized in these proceedings to take testimony. The Court could, upon timely application and notice, order that more testimony or addi-

tional evidence be taken by the Board. I agree with counsel for the union that no formal motion in that regard is necessary, but the stubborn fact is no application to do that, that is, to remand the proceedings back to the Board for the taking of additional testimony, has been made and the desire is stated only categorically and casually in the arguments of counsel in these proceedings, unless it be considered that the petition of the two unions to review necessarily encompasses the request that it be remanded for further testimony.

The Court has made a very careful study of the record in both proceedings, that is, to say that all the pleadings have been read and studied, all of the testimony has been read and studied and certain portions of it read a second time. The Court did not, because of a peculiar circumstance, have time to examine the some 154 or 155 exhibits that were introduced at the hearings before the Board, which consumed many days.

I personally regret that the inquiry before this Court in these proceedings is so narrow. I would much prefer if this Court had authority in law to apply equitable principles as would be the situation if the complainant here had seen fit to invoke the equity jurisdiction of this Court in seeking a temporary injunction and eventually a permanent injunction. Reasonable minds may differ and disinterested, impartial persons may not agree to the seriousness of the acts which the Board has found constitute unfair labor practice. This Court has no right to make inquiry as to the fairness or unfairness of the original demands of the Union as made early in the year, February, 1954, or maybe preceding the expiration of the contract in February, 1954, maybe the demands were in some form made in January of 1954. The Court has no right to com-

ment upon the soundness of the Company's position as to the demands of the two unions. The wisdom or lack of wisdom in calling the strike is not for this Court to decide. This Court has no right now to even make any observations as to the realistic views or attitudes of either the Company, who is the complainant here, or the two unions, nor in any type of critical language make any type of findings, even though it be dicta, as to the character and the tempo and the type of settlement negotiations. The Court has no right to pass upon the good faith or lack of good faith of any parties to this dispute even though the Court may have its own opinion with reference to all of these subjects.

The principal contention of the two unions is that the Labor Board and this Court lack jurisdiction in the matter now before the Court in a formal manner. The lack of jurisdiction as claimed by the respondent unions is based upon the claim that the National Labor Relations Act of 1947, the Congressional enactment, has pre-empted the field of labor controversies, employer and employee management and that there is no field left for state agencies like the Wisconsin Employment Relations Board and the Wisconsin courts to act with jurisdiction. With this contention I must respectfully disagree with the unions that are parties to these proceedings.

It is perfectly clear that proper state agencies, in which authority is given by statutes, and the courts that have certain inherent powers, have a right even in the labor controversy field where unfair labor practices are charged, that state administrative boards like the plaintiff in these actions or the petitioner in this one action, have a right and an area based upon state's rights, as distinguished from the rights under the Constitution that the Federal Government has pre-empted unto itself.



It would seem most unreasonable and illogical if the court should hold that a state court of record would be impotent to restrain the commission of acts that are in themselves illegal per se. There is no inherent right on the part of individual members of a union or the union as an organization or its officers in directing it to engage in mass picketing. There is no inherent right on the part of any of the members of unions to intimidate, to threaten, to assault or to unlawfully interfere with the liberties of any person, so it would seem to me that the complaint is groundless when it is exerted on the proposition that those types of acts should not be restrained.

There is one point made by counsel for the Unions that has given me pause and has concerned me during these arguments, to which I listened most attentively. The fact is the question arose in my mind independent of counsel's argument but counsel's logical approach to the question further agitated my thinking and made me less sure of a position that could be taken with reference to it, which is the position taken by the Labor Relations Board. That point is that something must transpire after the filing of the order, which was based upon findings of fact and conclusions of law relating to the testimony taken at the various hearings, and that some evidence must be produced before this Court or something in a formal way pointed out in these proceedings that shows that at a particular time after the filing of the order that the Wisconsin Employment Relations Board could come into court and ask for an enforcement decree of the order that it had previously filed. I believe the answer to that claim, as good as it sounds, is found right in the statute itself and if you are to give full and ordinary meaning to the use of words, the Court must disagree with that contention, with the others.

Sub-section (7), of Section 111.07 says:

"If any person fails or neglects to obey an order of the Board while the same is in effect the board may petition the circuit court of the county wherein such person resides or usually transacts business for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court its record in the proceedings, including all documents and papers on file in the matter, the pleadings and testimony upon which such order was entered, and the findings and order of the board. Upon such filing the board shall cause notice thereof to be served upon such person, \* \* \* and thereupon the court shall have jurisdiction of the proceedings and of the question determined therein."

That statute is purely a directory statute. The plaintiff, Wisconsin Employment Relations Board, is an administrative body invested with certain powers, authority and duties and the presumption is that the members of that Board, being public officers, acted within the law and within their jurisdiction and that they had not only the right but the duty to exercise a discretion as to whether enforcement proceedings should be initiated or not. The statute does not define or declare the type of investigation to be made by the Board after the order is filed, which would entitle them or require them, that is, the Board, to initiate proceedings for enforcement of the order. This record is sufficient unto itself to show that the Board did not violate its discretion and that its discretion was exercised in favor of instituting these proceedings.

It follows from what has been said that the petition for review by the two Unions named as petitioners against the Wisconsin Employment Relations Board and the Kohler Company, asking for a review of the order and a reversal

of the order and a dismissal of the complaint, be and hereby is dismissed.

It follows, of course, from what has been said that the plaintiff, Wisconsin Employment Relations Board, in its enforcement proceedings against the named respondents, shall have judgment of enforcement of the order filed by the Wisconsin Employment Relations Board on May 21, 1954, without modification and the order is in all things confirmed.

Dated: August 30, 1954.

### JUDGMENT

#### Title and Venue

The above entitled matter having come on for hearing on the 30th day of August, 1954, before the Court without a jury on the petition of the Wisconsin Employment Relations Board pursuant to Sec. 111.07 (4) and (7) of the Wisconsin Statutes for enforcement of a certain interlocutory order of the board, Beatrice Lampert appearing for the Wisconsin Employment Relations Board, Max Raskin and David Rabinovitz appearing for the respondents, and Lyman Congor and Lucius P. Chase appearing for the intervenor, Kohler Company, and the court having considered the arguments and briefs of counsel, and having reviewed the record returned by said board and being fully apprised in the premises, and having on the said date issued from the bench its decision and directions for judgment, Now, Therefore,

It is ordered, adjudged and decreed that the interlocutory order of the Wisconsin Employment Relations Board entered May 21, 1954 in the matter of the "Kohler Co., a

Wisconsin Corporation, Complainant, v. United Automobile Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations—UAW CIO, Harvey Kitzman, Frank J. Sahorski, Robert Burkart, Jess Ferrazza, Donald Rand, James Fiore, Frank Walleck, Raymond Majerus, Local Union Number 833, United Automobile, Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations—UAW CIO, Allen J. Graskamp, Arthur Bauer, E. H. Kohlagen, John J. Stieber, Bernard Majerus, Elmer H. Gross, Kenneth Nitsch, Curtiss R. Nack, Leo J. Prepster, Leo J. Breirather, Elmer A. Oskey, Gordon Majerus, Kenneth G. Klein, William E. Rawling, Edward C. Kalupa, John Konec, John M. Martin, Mattie Marchiando, Arthur L. Brewer, Peter J. Gasser, Jr., Nick Vrekovic, Franklyn S. Schroeder, David Rabinovitz, John Doe and other persons unknown, respondents, Case III, No. 5257 Cw-213, Decision No. 3740, be and the same is hereby confirmed and enforced, the court reserving jurisdiction to make such further order or judgment in the premises as may be necessary to give full force and effect to the order of the board and the enforcement thereof, on the evidence in the record or on the taking of such further evidence as appears to the court to be necessary, the present judgment and decree of the court to be deemed interlocutory as to those matters that may call for or require further action on the part of the court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the respondents United Automobile Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations—UAW CIO, Local Union Number 833, United Automobile Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations—UAW CIO, their officers, members and agents:



**A. Immediately cease and desist from:**

1. Coercing and intimidating any person desiring to be employed by the Kohler Company in the enjoyment of his legal rights, intimidating his family, picketing his domicile, or injuring the person or property of such persons or his employe.

2. Hindering or preventing by mass picketing threats, intimidation, force or coercion of any kind the pursuit of lawful work or employment by any person desirous of being employed by the Kohler Company.

3. Obstructing or interfering in any way with entrance to and egress from the premises of the Kohler Company.

4. Obstructing or interfering with the free and uninterrupted use of public roads, streets, highways, railways or private drives leading to the premises of the Kohler Company.

**B. Take the following affirmative action:**

1. Limit the number of pickets around the Kohler Company premises to a total of not more than 200, with not more than 25 at any one entrance. Such pickets are to march single file and to at all times maintain a space at least 20 feet in width at each entrance to the Kohler Company premises over which pickets will not pass and on which persons either on foot or in conveyance may freely enter or leave the premises without interference.

Dated September 1, 1954.

## APPENDIX E

### FINDINGS OF FACT, CONCLUSIONS OF LAW AND INTERLOCUTORY ORDER OF WISCONSIN EMPLOYMENT RELATIONS BOARD

#### Title and Venue.

The above entitled matter having come on for hearing before the Wisconsin Employment Relations Board on the 4th day of May, 1954, and having been adjourned and re-scheduled on the 12th day of May, 1954, and testimony having been taken on May 12, 13, 17, 18, and 19, 1954; the full Board being present and after considering the testimony, the arguments of counsel and being fully advised the Board makes the following Findings of Fact, Conclusions of Law, and Interlocutory Order.

#### FINDINGS OF FACT

1. That the officers, members and agents of Local Union No. 833, United Automobile Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations have engaged and are now engaging in mass picketing at the entrance to the plant of the Kohler Company at the village of Kohler, Wisconsin, and have been assisted and advised in such activities by Frank J. Sahorske, Robert Burkart, Jess Ferrazza, Donald Rand, James Fiore, Frank Walleck and Raymond Majerus, International Representatives of the United Automobile Aircraft and Agricultural Implement Workers of America.

2. That the officers, members and agents of the Respondent union have attempted by force, threats, intimidation and by massing pickets at the various entrances to the Kohler Company plant in Kohler, Wisconsin, to prevent

the lawful work or employment by persons desiring to work for the Kohler Company.

3. That the officers, members and agents of the Respondent Union by gathering in large numbers and mass formation around the various entrances to the Kohler Company and obstructing and interfering with the free use of the public streets in the village of Kohler, Wisconsin, particularly with the Industrial Road.

4. That officers, members and agents of the Respondent Union have forcefully taken into custody persons attempting to enter the plant of the Kohler Company, forced them to accompany such officers, members and agents to the strike headquarters of the Respondent Union and prevented them from pursuing their lawful work and employment. That in addition officers, members and agents of the Respondent Union have followed the cars of persons attempting to enter or leave the Kohler Company plant and picketed their homes and have threatened the persons desiring to work with physical injury.

Upon the basis of the above and foregoing Findings of Fact, the Board makes the following:

#### CONCLUSIONS OF LAW

That the officers, members and agents of Local Union No. 833, United Automobile, Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, and Frank J. Sahorske, Robert Burkart, Jess Ferrazza, Donald Rand, James Fiore, Frank Walleck, and Raymond Majerus as International Representatives, representing the United Automobile Aircraft and Agricultural Implement Workers of America, have violated Section 111.06 (2) (a) of the Wisconsin Statutes by picketing the domicile of persons desiring to

work at the Kohler Company, and Section 111.06 (2) (f) of the Wisconsin Statutes by hindering and preventing persons desiring to be employed by the Kohler Company by means of massed picketing and by means of obstructing and interfering with entrance to and egress from the plant of the Kohler Company and by obstructing and interfering with the free and uninterrupted use of the public roads, streets and highways.

Upon the basis of the above and foregoing Findings of Fact, and Conclusions of Law, the Board makes the following:

### ORDER

IT IS ORDERED that the Respondent Unions, their officers, members and agents immediately cease and desist from

1. Coercing and intimidating any person desiring to be employed by the Kohler Company in the enjoyment of his legal rights, intimidating his family, picketing his domicile, or injuring the person or property of such persons or his employe.

2. Hindering or preventing by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of lawful work or employment by any person desirous of being employed by the Kohler Company.

3. Obstructing or interfering in any way with entrance to and egress from the premises of the Kohler Company.

4. Obstructing or interfering with the free and uninterrupted use of public roads, streets, highways, railways or private drives leading to the premises of the Kohler Company.



IT IS FURTHER ORDERED that the Respondent Unions, their officers members and agents take the following affirmative action:

1. Limit the number of pickets around the Kohler Company premises to a total of not more than 200, with not more than 25 at any one entrance. Such pickets are to march in single file and to at all times maintain a space at least 20 feet in width at each entrance to the Kohler Company premises over which pickets will not pass and on which persons either on foot or in conveyance may freely enter or leave the premises without interference.

JAN 3 1956  
HAROLD S. WILEY, INC.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1955

No. 530

UNITED AUTOMOBILE, AIRCRAFT AND AGRICUL-  
TURAL IMPLEMENT WORKERS OF AMERICA,  
AFFILIATED WITH THE CONGRESS OF  
INDUSTRIAL ORGANIZATIONS,

UAW-CIO,

Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD

and KOHLER CO., a Wisconsin corporation,

Appellees

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

**REPLY BRIEF ON BEHALF OF  
THE APPELLANT**

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AFFILIATED WITH THE CONGRESS OF  
INDUSTRIAL ORGANIZATIONS,  
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Appellant, v.  
WISCONSIN EMPLOYMENT RELATIONS BOARD  
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Appellees**

---

**ON APPEAL FROM THE SUPREME COURT OF WISCONSIN**

---

**REPLY BRIEF ON BEHALF OF  
THE APPELLANT**

---

Appellant files the instant reply to emphasize certain weaknesses in appellees' case, as revealed by their motions to dismiss the instant appeal.

**CONGRESS HAS PROVIDED AN ADEQUATE AND EXCLUSIVE REMEDY TO DEAL WITH THE CONDUCT WISCONSIN HERE ATTEMPTED TO ENJOIN.**

W. E. R. B. argues there is no "adequate" federal remedy to prevent mass picketing, interference with traffic, domiciliary picketing and threats of violence. *This is not so.* All such conduct has been held to constitute unfair labor practices within the meaning of the National Labor Relations Act, as amended, and as such is subject to cease and desist orders of the National Labor Relations Board and, at the request of that Board, subject to *temporary restraining orders issued by the Federal District Courts immediately upon issuance of the Board's complaint and prior to final adjudication* [29 U. S. C. 160 (a) (c) (j)]. To characterize, as do appellees, the federal procedure as slow and inadequate is both inaccurate and, in any event, an argument which should be addressed to Congress.

*a* See: *Cory Corporation*, 84 N. L. R. B. 912—mass picketing;

*Mercury Mining and Construction Corporation*, 96 N. L. R. B. 1389—prevention of ingress and egress;

*Irwin-Lyons Lumber Company*, 87 N. L. R. B. 54—threats and intimidation;

*Mine Workers Local 12824*, 112 N. L. R. B. No. 24—interference with traffic;

*Perry Norwell Co.*, 80 N. L. R. B. 225—intimidating employee at domicile.

Thus, appellees cannot be heard to argue that appellant's conduct is not subject to regulation by the federal unfair labor practice procedure which Congress indicated and this Court has held is exclusive.

Kohler, in its motion to dismiss<sup>1</sup> (on pages 3, 4 and 5) makes the argument that paragraphs 3 and 4 of the State Board Order, being unrelated to coercion of employees, do not duplicate rights, prohibitions and remedies under the federal Act. We believe that an examination of Kohler's complaint filed with W. E. R. B. (R. 121-125) as well as the aforementioned paragraphs reveal that their entire thrust is directed towards the prohibition of coercion of employees in exercise of their rights. Their reference is to entrance to and egress from the Kohler Company and to streets and highways leading to the premises of the Kohler Company. We find it hard to accept what is obviously an afterthought, namely, that Wisconsin was regulating traffic. An unfair labor practice proceeding is a peculiar manner of doing so. If Wisconsin had really been concerned with the regulation of traffic (instead of, as obviously was the case, with the regulation of labor relations and a labor dispute) it might have enforced state traffic laws and local traffic ordinances. Furthermore, the determination that some of the conduct in-

<sup>1</sup> We discovered this NLRB decision subsequent to our statement on page 12 of the Jurisdictional Statement that we were unable to find a case specifically involving picketing of employee domicile. See also *Abe Meltzer, Inc.*, 108 NLRB 1506; *United Mine Workers, District 2*, 103 NLRB 1572; *Colonial Hardwood Flooring*, 84 NLRB 563; *Bechtel Corp.*, 108 NLRB 1070; *The Englander Co., Inc.*, 108 NLRB 38; *United Electrical Workers*, 106 NLRB 1372; *Union Supply Co.*, 90 NLRB 436; *Bell Aircraft Co.*, 105 NLRB 755; *Progressive Mine Workers, International Union v. NLRB*, 187 F. 2d 298 (C. A. 7), enf. 89 NLRB 1490.

volved is not subject to federal regulation belongs, as this Court has held, in the first instance to the National Labor Relations Board. *Garner v. Teamsters Union*, 346 U. S. 485, 490; *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 75 Sup. Ct. 480, 486. The same is true of the affirmative part of the state order which includes relief (by limiting the number of pickets) that, Kohler argues, would not be allowed by N. L. R. B. We believe questions such as whether or not certain types of relief are appropriate or available under the federal statute should also be resolved in the first instance by the federal Board.<sup>2</sup> In any event, it seems clear to us and we shall seek to demonstrate in more detail below, the State may not, in a state unfair labor practice proceeding *enlarge* upon the exclusive federal unfair labor practice procedure.

We emphasize in this connection what was already pointed out in our Jurisdictional Statement (on page 8), namely, that the very acts and conduct enjoined by W. E. R. B. are pleaded by Kohler Company (which filed the *state* complaint) in defense of the N. L. R. B. complaint in Case No. 13-CA-1780. The company, in that case, has already introduced proof of all such acts and conduct in justification for its own conduct charged as unfair labor practices under the National Labor Relations Act. Such proof has been received by the trial examiner of N. L. R. B. and is part of the record in that continuing proceeding. Thus, the very conduct enjoined by W. E. R. B. is now the subject matter and basis for fact finding and legal determinations by the federal Board. Surely, the conflict intended to be avoided by federal pre-emption of unfair labor practices and unfair labor practice proceedings cannot be more drastically illustrated than here.

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<sup>2</sup> NLRB's statutory authority in unfair labor practice cases includes power to " \* \* \* issue \* \* \* an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action \* \* \* as will effectuate the policies of this Act." (29 U. S. C. 160 (c).)



## II.

THE STATE MAY NOT DUPLICATE THE EXCLUSIVE FEDERAL PROCEDURE FOR PROHIBITING UNFAIR LABOR PRACTICES, WHATEVER ITS CONTINUED AUTHORITY MAY BE TO PROHIBIT OR PUNISH SUCH CONDUCT IN THE TRADITIONAL MANNER BY ENFORCING CRIMINAL LAWS OF GENERAL APPLICABILITY OR OTHER "HISTORIC" MEANS.

Appellees read recent decisions of this Court as reserving to the states "police control" by means of "extraordinary police measures" in the prevention of breaches of the peace and related conduct. From this they reason that, the State having such power, it may exercise it by defining and enjoining unfair labor practices under a state labor act even though this same conduct also constitutes unfair labor practices under the federal labor law. We submit that, whatever the accuracy of the premise, it is plain from this Court's decisions that the conclusion does not follow. This Court has found that Congress intended the *procedures* for the prevention of unfair labor practices to be *exclusive* and has therefore prohibited the *duplication of the federal remedy* with regard to such conduct by the State. In this connection we draw attention to appellees' completely inapposite if not misleading, citation of and quotation from *Algoma Plywood and Veneer Company v. W. E. R. B.*, 336 U. S. 301. This Court in that case allowed the State to prohibit enforcement of a maintenance of membership clause. "Since nothing in the Wagner or Taft-Hartley Acts sanctioned or forbade these clauses, they were left to regulation by the State." (*Weber v. Anheuser-Busch*, 348 U. S. 468). The National Labor Relations Act, as amended, in Section 14 (b) [29 U. S. C. 184 (b)] specifically authorizes application of state and territorial laws regulating union security

agreements. On the other hand, this Court in the *Algoma* case recognized the *exclusive* character of N. L. R. B.'s unfair labor practice procedures, stating:

"\* \* \* Section 10 (a) was designed \* \* \* to preclude conflict in the administration of remedies for the practices proscribed by Section 8." 36 U. S. 301, 306.)

We have already shown that Wisconsin here did, in fact, enjoin practices proscribed by Section 8.

This Court's concern with duplication of the exclusive federal remedy was again revealed in *Weber v. Anheuser-Busch*, 348 U. S. 468:

"In *Garner*, the emphasis was \* \* \* on two similar remedies, one state and one federal, brought to bear on precisely the same conduct."

This is exactly the case here.

We expressed on pages 14 and 15 of our Jurisdictional Statement, disagreement with *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656. That decision, however, need not be reversed for appellant to prevail here, for in *Laburnum* "the violent conduct was reached by a remedy having no parallel in, and not in conflict with, any remedy afforded by the federal Act." (Italics supplied; *Weber v. Anheuser-Busch*,

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<sup>3</sup> The cession proviso in Section 10 (a) (29 U. S. C. 160 (a)) indicates a clear Congressional intent to make these federal procedures exclusive, leaving the states free to act only where cession has taken place pursuant to the proviso. This Court said in *Bus Employees v. WEBB*, 340 U. S. 383, 397: "Congress demonstrated that it knew how to cede jurisdiction to the states."

supra).<sup>4</sup> The inference is clear that the State is *without* jurisdiction to regulate "*violent conduct*" where the state remedy has a parallel in the federal Act (to the extent, as is the case here, of exactly duplicating it). The very quotation from the *Laburnum* case contained on page 5 of W. E. R. B.'s motion proves our point, it becoming apparent from it that *the state procedure survives only if there is no conflict with the federal remedy.*<sup>5</sup>

### III.

THIS COURT'S CITATION OF ALLEN BRADLEY, FOLLOWING THE ENACTMENT OF THE TAFT-HARTLEY AMENDMENTS, MEANS AT MOST THAT THE STATES MAY PROHIBIT OR PUNISH CONDUCT AS IS INVOLVED HERE IN A MANNER NOT PARALLELING, DUPLICATING, OR CONFLICTING WITH THE FEDERAL REMEDY.

An examination of pages 4 and 5 of W. E. R. B.'s motion suggests that Wisconsin does not understand "the rule announced in *Allen Bradley*". This rule appears to be as follows:

"Congress has not made such employee and union conduct as is involved in this (the *Allen Bradley*) case subject to regulation by the Federal Board." 315 U. S. 740, 749.

"Certain conduct, such as mass picketing, threats, violence, and related actions we held (in *Allen Bradley*) were not governed by the Wagner Act, and hence Wisconsin was free to regulate them." (*Hill v. Florida*, 325 U. S. 538, 539.)

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<sup>4</sup> The federal remedy being preventive rather than remedial. Here the WERB order appears to be preventive in the same sense as this Court (in *Laburnum*) characterized the federal remedy.

<sup>5</sup> " \* \* the care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies was, itself, a recognition that if no conflict had existed, the state procedure would have survived \* \* ." (Italics supplied.)

"The Court held (in *Allen Bradley*) that such conduct was not subject to regulation by the federal Board, either by prohibition or by protection." (*Weber v. Anheuser-Busch*, *supra*.)

It can be argued from these summaries of the "rule in *Allen-Bradley*" that the *ratio decidendi* of that case is no longer applicable because now "such conduct" is subject to prohibition by the federal Act and Board.<sup>6</sup> We realize that this Court, nonetheless, has continued to cite *Allen-Bradley* in support of state power to exercise "police control" and take "extraordinary police measures" to prevent breaches of the peace and preserve public safety and order and use of streets and highways (*cf. Garner v. Teamsters Union*, 346 U. S. 485, 488; *International Union v. O'Brien*, 339 U. S. 454, 459). We submit the only way in which these expressions of the Court concerning *Allen-Bradley* can be kept consistent with the rule of *Garner* and *Anheuser-Busch* (that the states may not enjoin unfair labor practices coming under the jurisdiction of N. L. R. B. and may not duplicate the procedures and remedies of the federal Board), is to hold that the states may control violence only by procedures not duplicating the federal remedy. That this appears, in fact, to be the Court's position is apparent from the *Laburnum* decision. This, we submit, is also the significance of the Congressional debates reproduced, in part, on pages 9 through 12 of Kohler's motion to dismiss this appeal. These Congressional discussions reveal, at most, that in situations similar to the case at bar two remedies (but certainly not two identical remedies)—one state, one federal—might be

<sup>6</sup>This same *ratio decidendi* applies to *International Union UAW-AFL v. WERB*, 336 U. S. 245, for the conduct there involved was, in the view of this Court, neither protected by the federal Act nor forbidden by it.



brought to bear on the same conduct. The reference is always to "good local law enforcement" of "State and local *police* law". Such references seem to apply to the enforcement of criminal laws of general applicability in the ordinary exercise of "police power" for the maintenance of the public peace, or to similar "historic" measures. Congress, in 29 U. S. C. 160(a), would hardly have established an exclusive procedure for the prevention of unfair labor practices (indicating the *specific method* for ceeding jurisdiction in unfair labor practice cases to the States) and at the same time have intended the states to apply the identical remedy to the same conduct.<sup>2</sup>

Wisconsin here, of course, precisely duplicated the federal remedy in an unfair labor practice proceeding under the state labor act.

Respectfully submitted,

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<sup>2</sup> The case of *Schneider v. Irvington*, 308 U. S. 147, cited on page 4 of Kohler's motion for the proposition that a State may regulate use of its streets and highways as long as it abridges no federal rights is, of course, inapplicable to the case at bar where the conduct involved is subject to prohibition by an exclusive federal procedure.

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Appellees

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—♦—  
**ON APPEAL FROM THE SUPREME COURT OF WISCONSIN**  
—♦—

**BRIEF FOR THE APPELLANT**  
—♦—

**OPINIONS BELOW**

The opinion of the Supreme Court of Wisconsin (R. 21) is reported at 269 Wis. 578, 70 N. W. 2d 191. The opinions of the Circuit Court (R. 13) and of the Wisconsin Employment Relations Board (R. 7) are not reported.

## JURISDICTION

The Supreme Court of Wisconsin, on May 3, 1955, entered its opinion and judgment (R. 19). A timely motion for rehearing filed on May 21, 1955, was denied on June 28, 1955. Notice of appeal to this Court was filed in the Wisconsin Supreme Court on the 23rd day of September, 1955. The appellant's Jurisdictional Statement was filed November 21st, 1955. This Court noted probable jurisdiction on January 30, 1956. The jurisdiction of the Supreme Court to review this decision is conferred by Title 28, U. S. C. Section 1257(2); since the validity of a state statute on grounds of repugnancy to a law and the Constitution of the United States is drawn in question.

## QUESTIONS PRESENTED

1. Whether the State of Wisconsin, in view of this Court's admonition (in *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468) that "a State may not enjoin under its own labor statute conduct which has been made an 'unfair labor practice' under the federal statutes", may, in an unfair labor practice proceeding under its labor statute, the Wisconsin Employment Peace Act, enjoin conduct of a kind which may be an unfair labor practice under the National Labor Relations Act, as amended, and which the National Labor Relations Board alone is empowered to investigate and, if proven, to prevent.

2. Whether the State of Wisconsin, under its own labor statute, may regulate the kind of conduct of a labor organization which may be an unfair labor practice under the National Labor Relations Act, as amended, where the National



Labor Relations Board at the time of the State proceeding had asserted and was asserting jurisdiction in representation and unfair labor practice proceedings under the federal statute over the same employer-union relationship, and where the conduct enjoined under the State act has also been pleaded by the employer, who filed the State complaint, in defense of an unfair labor practice complaint issued by the General Counsel of the Federal Board.

3. Whether the State of Wisconsin is not obligated to decline to take jurisdiction under its labor act over conduct of the kind which may be regulated by the National Labor Relations Act, as amended, until *after* a determination by the National Labor Relations Board that the particular conduct involved is not so regulated.

### STATUTES INVOLVED

The pertinent statutory provisions appear in Appendices A and B, *infra*.

### STATEMENT

The appellant, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-CIO, and its Local Union 833, were certified by the National Labor Relations Board as collective bargaining representative of all production workers of the Kohler Company on June 19, 1952. The certification followed a representation proceeding and election conducted by the National Labor Relations Board pursuant to Section 9 of the National Labor Relations Act, as amended. An earlier representation proceeding involving the same parties is reported at 93 N. L. R. B. 398.

On February 23, 1953, the appellant and its Local Union 833 UAW-CIO on behalf of the production workers of the Kohler Company executed a collective bargaining agreement which expired March 1, 1954.

Prior to January 1, 1954, pursuant to the requirements of Section 8 (d) of the National Labor Relations Act, as amended, notice was given to the Kohler Company of the intended termination of said contract as of March 1, 1954 (R. 21). The parties were unable to reach an agreement for a new contract and on April 5, 1954, the production employees of the Kohler Company went on strike and picketed the premises.

On April 15, 1954, the Kohler Company filed a complaint with the Wisconsin Employment Relations Board, charging appellant (and others) with unfair labor practices within the meaning of the Wisconsin Employment Peace Act, Wisconsin Statutes 1953, Ch. 111, subchapter 1 R. 1). The gist of the complaint was that appellant (and others) had engaged in mass picketing, obstruction of ingress to and egress from the plant, violence and threats of violence—all in contravention of the Wisconsin labor statute.

After hearing, which ended on May 19, 1954, the Wisconsin Employment Relations Board entered a so-called interlocutory order [which by the express terms of the Wisconsin statute is final in character and effect; Wisconsin Statutes, 1953, Section 111.07 (4)], finding appellant (and others) guilty of unfair labor practices within the meaning of the Wisconsin Employment Peace Act. The Board concluded that appellant (and others) had:

“ \* \* \* violated Section 111.06 (2)(a) of the Wisconsin Statutes by picketing the domicile of persons desiring to work at the Kohler Company, and Section 111.06 (2) (f) of the Wisconsin Statutes by

hindering and preventing persons desiring to be employed by the Kohler Company by means of massed picketing and by means of obstructing and interfering with entrance to and egress from the plant of the Kohler Company and by obstructing and interfering with the free and uninterrupted use of the public roads, streets and highways" (R. 8).<sup>1</sup>

On August 30, 1954, the Circuit Court of Sheboygan County, Wisconsin entered an opinion (R. 13) on a petition by the Wisconsin Employment Relations Board dated May 25, 1954 (R. 5) for enforcement of and on a petition by appellant (and others) for review of the order. (The petition for review is *dehors* the record but noted in the opinions filed by both the Circuit and the Supreme Court.) The Court enforced the Board's order.

<sup>1</sup> On the basis of these findings the Wisconsin Board entered the following order:

**"IT IS ORDERED** that the Respondent Unions, their officers, members and agents immediately cease and desist from

1. Coercing and intimidating any person desiring to be employed by the Kohler Company in the enjoyment of his legal rights, intimidating his family, picketing his domicile, or injuring the person or property of such persons or his employe.
2. Hindering or preventing by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of lawful work or employment by any person desirous of being employed by the Kohler Company.
3. Obstructing or interfering in any way with entrance to and egress from the premises of the Kohler Company.
4. Obstructing or interfering with the free and uninterrupted use of public roads, streets, highways, railways or private drives leading to the premises of the Kohler Company.

**IT IS FURTHER ORDERED** that the Respondent Unions, their officers, members and agents take the following affirmative action:

1. Limit the number of pickets around the Kohler Company premises to a total of not more than 200, with not more than 25 at any one entrance. Such pickets are to march in single file and to at all times maintain a space at least 20 feet in width at each entrance to the Kohler Company premises over which pickets will not pass and on which persons either on foot or in conveyance may freely enter or leave the premises without interference" (R. 9).

Appeal was taken to the Supreme Court of Wisconsin, which on the 3rd day of May, 1955, after consolidated hearing, affirmed both judgments (on the two petitions) of the Circuit Court for Sheboygan County. The Supreme Court of Wisconsin found, and appellee Kohler Company has conceded, that Kohler's operations affect commerce within the meaning of Section 2 (7) of the National Labor Relations Act, as amended. In addition, the state court took cognizance of the past and pending assertion of jurisdiction in representation and unfair labor practice proceedings by the National Labor Relations Board over the labor relations of Kohler Company (R. 21).

The Court below concluded that the action of the Wisconsin Board constituted a valid exercise of the State's police powers as against the assertion that the State was no longer authorized to enjoin under its labor act conduct of the kind which may be unfair labor practices under the National Labor Relations Act as amended. In addition, the Court disposed of a defense asserted by appellant that the Kohler Company on its part had acted wrongly (by having in its plant a supply of clubs, guns and tear gas) by stating that this should have been made the subject of a separate complaint to be filed with the Wisconsin Employment Relations Board (R. 30).. A motion for rehearing was denied on June 28, 1955.

In addition to the National Labor Relations Board representation proceedings previously mentioned, the National Labor Relations Board has continued to exercise its jurisdiction over the labor relations of the Kohler Company in the following several proceedings:

On charges filed November 2, 1951 and May 5, 1952 by individual employees and also on May 5, 1952, by an independent labor organization which later affiliated with



appellant, the National Labor Relations Board issued a consolidated complaint and, on April 12, 1954, filed a decision and order finding the Kohler Company guilty of unfair labor practices within the meaning of Section 8 of the National Labor Relations Act, as amended. *Kohler Company*, 108 N. L. R. B. 207. This decision was enforced on March 7, 1955, (rehearing denied April 7) by the United States Court of Appeals for the Seventh Circuit. *N. L. R. B. v. Kohler Co.*, 220 F. 2d 3 (C. A. 7).

Furthermore, on October 26, 1954, the National Labor Relations Board issued a further complaint charging the Kohler Company with unfair labor practices in connection with the present strike. The gist of the charges was that Kohler had refused to bargain, had discriminated against employees for exercising their rights under the Federal Act, and had engaged in other forms of forbidden interference (see Appendix C). The union claims, in particular, that the strike was caused and prolonged by the refusal to bargain. Thus the question of its picket line conduct is closely inter-related with the Company's conduct in this dispute. Hearings on this complaint, which is Case No. 13-CA-1780, commenced in February, 1955, and are continuing. Although no record of the current and continuing unfair labor proceeding by N. L. R. B. against Kohler Co. is included in the record in this appeal, that proceeding is a public record and we believe we may with propriety advise the Court that all of the acts and conduct from which appellant was enjoined by the Wisconsin Employment Relations Board are pleaded by appellee, Kohler Company, in defense of the National Labor Relations Board complaint and in justification for its own conduct charged as unfair labor practices under the National Labor Relations Act and that proof of all such acts and conduct has already been received by the Trial Examiner of the National Labor Relations Board and is presently part of the record in that continuing proceeding. Excerpts from the pleadings in N. L. R. B. case 13-CA-1780 are attached hereto as Appendix C.

## SUMMARY OF ARGUMENT

I. The Wagner Act protected certain employee rights, and prohibited employer interference with these rights as unfair labor practices. It also provided centralized administrative machinery for preventing such employer unfair labor practices. The Taft-Hartley amendments to the Wagner Act added prohibitions against union unfair labor practices and confided the enforcement of these additional rules also to the National Labor Relations Board. The Wisconsin Employment Peace Act substantially duplicates the Taft-Hartley Act by setting forth employee rights and by prohibiting both employer and union unfair labor practices. It also provides administrative procedures similar to those contained in the Federal Labor Act. The Wisconsin Employment Relations Board in this case enjoined as unfair labor practices under the State Labor Act conduct affecting interstate commerce of the kind that has been held to be an unfair labor practice within the meaning of the National Labor Relations Act. Wisconsin, thus, has sought to apply its own procedural and substantive law in a field which Congress has entered by establishing both substantive rules and a central administrative agency for the interpretation and enforcement of such rules. This is in direct conflict with the decisions of this Court holding that the federal procedure for preventing unfair labor practices is exclusive and, that, therefore, a state may not apply its own unfair labor practice remedy against conduct which may be an unfair labor practice under the federal act and that a state may not otherwise duplicate the exclusive federal unfair labor practice procedure. *Garner v. Teamsters Union*, 346 U. S. 485; *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468. These decisions take cognizance

of the fact that Congress in Section 10 (a) of the N. L. R. A., as amended has designated the National Labor Relations Board as the special tribunal to enforce the federal labor policy and has specified the precise method by which that agency may cede some of its power to the states. This Court has recognized in other decisions that the states may apply their own law and remedy only where either Congress has expressly authorized such application (as in Section 14 (b) of the Taft-Hartley Act; *Algoma Plywood and Veneer Company v. W. E. R. B.*, 336 U. S. 301) or the state remedy does not duplicate and is not in conflict with the federal remedy (*United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656). Barring these exceptions, however, the federal board is the *only* tribunal empowered, in the first instance, to determine whether or not conduct is prohibited as an unfair labor practice; and consequently, where conduct reasonably falls within the sections of the federal statute prohibiting unfair labor practices, as is the case here, the state tribunals must decline jurisdiction:

II. Factually, this case is substantially similar to *Allen-Bradley Local 1111 v. W. E. R. B.*, 315 U. S. 740. But the *Allen-Bradley* case was decided before the Federal Act had been amended to prohibit union unfair labor practices. Thus, the fundamental principle for which *Allen-Bradley* stands, namely, that the states continue free to regulate conduct not regulated by the Federal Act, is not applicable here. Insofar as the *Allen-Bradley* case has been cited by this Court since the Taft-Hartley amendments for the right of the states to continue exercising historic powers over the public peace, it is also inapplicable. For, while the states may continue free to enforce criminal laws of general applicability to, prohibit disturbances of the peace and punish

violence, they may not enforce their own policy relating to the proper method of conducting strikes and other labor controversies. And it is clear that the Wisconsin Employment Peace Act represents the State's labor policy, closely duplicating both in substance and procedure, the national labor policy, and it is not primarily general police regulation of breaches of the peace or traffic. The case of *UAW-AFL v. W. E. R. B.*, 336 U. S. 245, also is a ruling to the effect that a state may continue to regulate conduct not protected or prohibited by the Federal Labor Act. But neither the *Allen-Bradley* nor the *Briggs-Stratton* case support state jurisdiction under a state labor statute over conduct which is also regulated by the Federal Labor Act.

III. Appellant is not claiming immunity in this case and is not arguing that it is beyond the authority of local government to proscribe the type of conduct here involved under laws of general applicability, regulating all persons, including unions, as well as "unorganized private persons". Indeed the Wisconsin Employment Peace Act expressly preserves the pursuit of appropriate legal and equitable relief, apart from and in addition to the special sanctions and additional restrictions it purports to apply with respect to labor controversies. The question is not whether Wisconsin may apply traditional sanctions based on historic measures generally applicable to everyone, but whether the State may superimpose its own special unfair labor practice remedy upon the exclusive federal unfair labor practice remedy. We think the answer to this question is "No" in view of the statutory language and this Court's decisions.

IV. We think the answer to this question is "No" also in view of the legislative history preceding the enactment of the Taft-Hartley amendments. That history reveals



that Section 8 (b)(1), the provision of the Taft-Hartley Act upon which our claim of conflict rests, resulted from a Congressional concern over the supposed failure of local law enforcement in labor dispute contexts. It could be argued that federal enactment in this area replaces state regulation of violence in labor disputes. Whatever the merits of that contention, it is evident that, at most, Section 8 (b)(1) complements local enforcement of state criminal laws. Thus, opponents to the measure in the Senate pointed out that federal prohibition of union coercion was unnecessary because such conduct was already subject to state criminal penalties. On the other hand, the proponents argued that the peace officers charged with enforcing such generally applicable criminal laws would be encouraged by the addition of a federal administrative procedure dealing, in part with the same ground. Thus, the legislative history appears to give some support to the application of *two* remedies for the same conduct. But, Wisconsin here is arguing for *three* remedies, namely, the federal unfair labor practice remedy, the state unfair labor practice remedy, and such other legal or equitable relief as might be appropriate and available. But neither the opponents nor proponents of Section 8 (b)(1) assumed that state labor relations procedure *and* federal labor relations procedures would be imposed on the existing criminal law, and the repeated reference in the debates to existing state law and the police powers of the state, which would be duplicated by Section 8 (b)(1), were references to the general state criminal law, not to state labor relations acts.

V. The possibility of conflict between state and federal regulation provides the foundation for the pre-emption doctrine. In this case, the possibility of conflicting jurisdiction has been realized. The National Labor Re-

lations Board has asserted jurisdiction over the Kohler Company in representation and unfair labor practice proceedings. Indeed, the very conduct involved in the State proceeding is also currently the subject of a National Labor Relations Board proceeding. N. L. R. B. has issued a complaint on charges filed by appellant alleging unfair labor practices on the part of Kohler Company. Hearings on this complaint are continuing. Thus, both the federal and state labor relations board are seeking to exercise jurisdiction over the same controversy. In addition, the company, in defending in the federal proceeding, is asserting the same conduct of the union over which it complained in the Wisconsin proceeding. Thus, Kohler has itself illustrated that the Federal Act is an integrated whole and that one cannot separate out part of the conduct of one of the parties to a labor dispute and deal with it separately without destroying the Congressional scheme for the regulation of such disputes. Conduct on picketlines, is, in part, determined by an employer's conduct in bargaining. Conversely, an employer's bargaining strategy and decisions may be affected by picketline conduct. All these issues are necessarily inter-related and Congress has enacted a statute under which an entire such controversy can be taken in hand. Wisconsin, too has such a statute. But it is clear that the Wisconsin board cannot take hold of the whole controversy. Even if appellees are correct in their contentions, only the single issue of union coercion can be decided by the Wisconsin board. The other issues in the dispute, their inter-relationships, and indeed, the factual re-determination of the coercion issue itself are all subject to N. L. R. B. adjudication. We do not think the kind of one-sided and truncated adjudication entailed necessarily in appellees' position can be permitted to stand in the face of the Federal Act.

## ARGUMENT

### I.

Wisconsin acted beyond its authority when it sought:

- (A) to enjoin under its own labor act the kind of conduct which the National Labor Relations Board has exclusive powers to investigate and prevent; and
- (B) to duplicate in a state administrative unfair labor practice proceeding the exclusive federal procedure and remedy for investigating and regulating such conduct.

Wisconsin here has sought under its labor act to take hold of one single phase of a complex labor dispute—namely, alleged coercive union conduct. By enjoining such conduct it has impinged upon the special procedure designated by Congress for investigating and preventing such conduct. The State has also, by singling out but one phase of a complex labor dispute (it being clear it has no authority to prevent any *other* union and *any* employer unfair labor practices under *Plankinton Packing Company v. W. E. R. B.*, 338 U. S. 953 and *Garner v. Teamsters Union*, 346 U. S. 485) undermined the comprehensive Congressional scheme for the regulation of such labor disputes. For, while the original National Labor Relations Act (usually referred to as the Wagner Act) merely protected certain union and employee activities and prohibited unfair labor practices and provided a centralized administrative machinery for the protection of union and employee rights against such employer practices, the federal government by enacting the Taft-Hartley amendments, established a much more comprehensive scheme of regulation embodied in the Labor Management Relations Act.

1947, 29 U. S. C. 141 ff. That act not only, for the first time, laid down a substantive federal prohibition against union unfair labor practices; as was said in *Garner v. Teamsters Union*, 346 U. S. 485, 490, it also confided the "primary interpretation and application" of these new rules to the "specific and specially constituted tribunal" which had previously administered the rules against employer unfair practices. The "centralized administration of specially designed procedures" which this Court said in the *Garner* case "was necessary to obtain uniform application . . . and to avoid these diversities and conflicts likely to result from a variety of legal procedures and attitude toward labor controversies" was made applicable to *both* employer and union activities. In particular, Section 7 (29 U. S. C. 157) was amended to state the right of employees to refrain from concerted activity as well as their right to engage in such activity. And a new Section 8 (b)(1) [29 U. S. C. 158 (b) (1)] was enacted which provided that it was an unfair labor practice for a union or its agents to restrain or coerce employees in the exercise of their Section 7 rights.

The Wisconsin labor statute, the Employment Peace Act, substantially duplicates these features of the federal law. Wisconsin Statutes, 1953, Chapter 111, Sub-chapter I; see Appendix A *infra*. This statute sets forth employee rights (in Section 111.04) and regulates both employer and union unfair labor practices (Section 111.06). Sections 111.06 (2)(a) and (f), in particular largely duplicate Section 8 (b)(1)(a) of the National Labor Relations Act, as that provision has been interpreted by the National Labor Re-



lations Board.<sup>2</sup> The State Act also provides administrative procedures, similar to those contained in the federal labor statute, by which the State's labor policy is to be enforced.

The Wisconsin Board in this case sought to enjoin conduct of the appellant as unfair labor practices under the state labor act. That conduct, as found by W. E. R. B., consisted of mass picketing, prevention of egress from and ingress to the plant, threats and intimidation of employees, picketing of domiciles of employees, and obstruction of traffic. These unfair labor practices under the Wisconsin labor statute are the kinds of conduct that have been held to be unfair labor practices within the meaning of and under the National Labor Relations Act, as amended, and appellant almost certainly would have been prevented from committing them had charges been filed

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<sup>2</sup> The relevant statutory provisions are:

**Section 111.04:**

"111.04 *Rights of employees.* Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

**Section 111.06 (2) (a) (f):**

"(2) It shall be an unfair labor practice for an employee individually or in concert with others:

(a) to coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family.

(f) To hinder, or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

with and proven before the federal board.<sup>3</sup> One of the asserted purposes of Section 8 (b)(1)(a) was to outlaw "mass picketing and other forms of violence designed to prevent individuals from entering or leaving a place of employment". 1 *Legislative History of the Labor Management Relations Act, 1947*, 297. Appellant's conduct, as found by W. E. R. B., was thus of the kind which the National Labor Relations Board is empowered to investigate and concerning which it has exclusive powers to determine its legality or illegality as unfair labor practices. Had the conduct been proven to the satisfaction of the federal board, that board's procedures, which include temporary relief upon issuance of the Board's complaint and prior to final adjudication, and lead to cease and desist orders, were applicable and thus could and should have been invoked.

Wisconsin in this case has thus sought to apply its own procedural and substantive law in an area which Congress has entered by providing both substantive rules and charging a central and expert agency with their interpretation and enforcement. In so doing, Congress has indicated its intent to provide the benefits of an orderly system of adjudication by an expert board; thereby avoiding conflicts and confusion resulting from exercise of varying local authority in the solution of what, in the eyes of Congress,

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<sup>3</sup> *Cory Corporation*, 84 NLRB 972 (mass picketing); *Mercury Mining and Construction Corporation*, 96 NLRB 1389 (prevention of ingress and egress); *Irwin-Lyons Lumber Co.*, 87 NLRB 54 (threats and intimidation); *Mine Workers Local 1282*, 112 NLRB No. 24 (interference with traffic); *Perry Norwell Co.*, 80 NLRB 225 (intimidating employee at domicile); see also *Smith Cabinet Mfg. Co.*, 81 NLRB 886; *Abe Meltzer, Inc.*, 108 NLRB 1506; *Tungsten Mining Corp.*, 106 NLRB 903; *United Mine Workers, District 2*, 103 NLRB 1572; *Sunset Line and Twine Co.*, 79 NLRB 1487; *North Electric Mfg. Co.*, 84 NLRB 136; *Colonial Hardwood Flooring*, 84 NLRB 563; *Bechtel Corp.*, 108 NLRB 1070; *The Englander Co., Inc.*, 108 NLRB 38; *United Electrical Workers*, 106 NLRB 1372; *Union Supply Co.*, 90 NLRB 436; *Local 6281, United Mine Workers*, 100 NLRB 392; *Bell Aircraft Co.*, 105 NLRB 755; *Progressive Mine Workers, International Union v. NLRB*, 187 F. 2d 298 (C. A. 7), enf. 89 NLRB 1490.

was an interstate and national problem. Appellant has been deprived of the right to have its conduct investigated and evaluated by this central and expert tribunal established by Congress. Further, we have been deprived of the right to have this conduct examined as part of and in its relation to a complex labor dispute that includes claimed unfair practices by Kohler. For it is clear that the Wisconsin board has no authority to engage upon such comprehensive investigation and regulation. Not even appellees are asserting such sweeping powers on the part of the State but are rather saying that they are free to single out one particular phase of a complex situation for regulation. The essential lack of wisdom and fairness of such an approach was poignantly expressed by the Circuit Judge when he said, on reviewing the W. E. R. B. order:

"I personally regret that the inquiry before this Court in these proceedings is so narrow" (R. 14).<sup>4</sup>

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<sup>4</sup> The Circuit Judge continued: "I would much prefer if this Court had authority in law to apply equitable principles as would be the situation if the complainant here had seen fit to invoke the equity jurisdiction of this Court in seeking a temporary injunction and eventually a permanent injunction. Reasonable minds may differ and disinterested, impartial persons may not agree to the seriousness of the acts which the Board has found constitute unfair labor practice. This Court has no right to make inquiry as to the fairness or unfairness of the original demands of the Union as made early in the year, February, 1954, or maybe preceding the expiration of the contract in February, 1954, maybe the demands were in some form made in January of 1954. The Court has no right to comment upon the soundness of the Company's position as to the demands of the two unions. The wisdom or lack of wisdom in calling the strike is not for this Court to decide. This Court has no right now to even make any observations as to the realistic views or attitudes of either the Company, who is the complainant here, or the two unions, nor in any type of critical language make any type of findings, even though it be dicta, as to the character and the tempo and the type of settlement negotiations. *The Court has no right to pass upon the good faith or lack of good faith of any parties to this dispute even though the Court may have its own opinion with reference to all of these subjects.*" (Emphasis added.)

This should be contrasted with NLRB treatment of picketline conduct in relation to employer unfair practices. *NLRB v. Thayer*, 213 F. 2d 748 (CA 1). For NLRB treatment of mass picketing, see for example, *District Council, AFL*, 95 NLRB 969, 999.

The Court is referred to Section V of this Argument for a more detailed description of the evils resulting from such piecemeal regulation of labor disputes as Wisconsin is here proposing.

This case therefore presents an occasion for invoking the principles of federal preemption under the Commerce and Supremacy Clauses of the Constitution. These principles, generally stated, are that where Congress has taken a field in hand and indicated the substantive and adjective law for its regulation, the states may not regulate the same field in duplication or complementation of, or in opposition to, the federal law.

This Court has given these general principles concrete application in the labor relations field; and it need not look beyond precedent to reverse the decision below in this case. Indeed, it need not even apply that precedent to the fullest for appellant to prevail. One of the principles emerging plainly from the cases decided by this Court is that "A State may not enjoin under its own labor statute conduct which has been made an 'unfair labor practice' under the federal statutes." *Weber v. Anheuser-Busch*, 348 U. S. 468, 475. This is what Wisconsin here sought to do. Beyond this, the Court has held that a state may not, on any policy, duplicate the exclusive federal unfair labor practice procedure and remedy to prevent conduct subject to federal regulation.<sup>5</sup> The conclusion of this Court is that

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<sup>5</sup> Thus, in *Weber v. Anheuser-Busch*, 348 U. S. 468, a state court injunction grounded upon a state anti-monopoly statute was set aside as duplicating and possibly conflicting with the federal unfair labor practice remedy. In *General Drivers Union v. American Tobacco Co.*, 348 U. S. 978, this Court set aside *per curiam* an injunction restraining conduct characterized by the state court as a violation of the constitutional, common, statutory and criminal law of Kentucky. *Drivers Union v. American Tobacco Co.*, 264 S. W. 2d 250.



Congress intended the *procedures* for the prevention of unfair labor practices to be *exclusive* and therefore intended to prohibit duplication of this exclusive remedy with regard to such conduct by the states. It would be presumptuous to review in detail the history of this Court's pre-emption decisions in the labor relations field in view of the detailed summary contained in *Weber v. Anheuser-Busch, supra*. Suffice it to say here that these decisions of the Court have recognized the pre-emptive and exclusive character of the federal regulation, as to its protective and prohibitive, as well as procedural features.

The crucial statutory language may be found in Section 10 (a) [29 U. S. C. 160 (a)] of the Taft Hartley Act.<sup>6</sup> This language accomplishes two things. It establishes, as this Court has frequently recognized, that the unfair labor practice procedures of the federal Board are to be the only remedy for preventing unfair labor practices listed in the statute. Furthermore, Congress indicated a method of cession under which the states could acquire jurisdiction otherwise belonging to the federal board. The significance of this Section 10 (a) has been repeatedly recog-

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<sup>6</sup> We quote it here in full:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter, or has received a construction inconsistent therewith."

nized by this Court. Thus, in *Amalgamated Association v. W. E. R. B.*, 340 U. S. 383, 397-398:

"When it amended the Federal Act in 1947, Congress was not only cognizant of the policy questions that have been argued before us in these cases, but it was also well aware of the problems in balancing state-federal relationships which its 1935 legislation had raised. The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co. v. New York Labor Board*, 1947, 330 U. S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234, and in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states."

See also *Rice v. Sante Fe Elevator Corporation*, 331 U. S. 218, 236. The conclusion that Section 10(a) means a state cannot act in a case over which the Federal Board has jurisdiction in the absence of cession was also well stated in *Retail Clerks v. Your Food Stores*, 225 F. 2d 659, 663 (C. A. 10, 1955):

"Amended section 10 (a) of the Act specifically provides what this Court deems to be the only way state authorities can be vested with authority now within the exclusive purview of the Act. Unless and until there is an express ceding of jurisdiction to a proper state agency exclusive jurisdiction remains in the federal agency. For sake of order such must be true. Otherwise, an interminable problem of determining jurisdiction would exist, throwing needless confusion into an area clearly pre-empted by Congress."

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\* Footnote of the Court: "Section 10 (a) of the 1947 Act, 29 U. S. C. (Supp. III) Section 160 (a), 29 U. S. C. A. Section 160(a). A proviso of Section 10 (a) authorizes cession of jurisdiction to the states only where the state law is consistent with the federal legislation. This insures that the national labor policy will not be thwarted even in the predominantly local enterprises to which the proviso applies. S. Rep. No. 105, 80th Cong., 1st Sess. 26 (1947). See also minority views to same report, id., pt. 2, 38, agreeing as to this feature of the legislation."

One additional decision of this Court requires comment in this context. Appellees may rely on *Algoma Plywood and Veneer Co. v. W. E. R. B.*, 336 U. S. 301. This reliance is obviously misplaced.

The *Algoma* case concerned the provisions of the Wisconsin labor relations statute regulating union shop agreements. The case arose before the passage of the Taft-Hartley Act, but was decided after its passage. The Court allowed the state law, which contained more severe union security restrictions than the Federal Act, to prevail, concluding that the states had authority to impose such additional restrictions both under the Wagner and under the Taft-Hartley Act. Insofar as the Wagner Act was concerned, it contained merely permissive federal regulation of union security agreements, and the legislative history of that statute made the authority of the states in this area clear. The portions of the opinion dealing with the post Taft-Hartley validity of the Wisconsin statute were controlled by the fact that Congress, in Section 14(b) of the Taft-Hartley Act, specifically provided for the continued enforceability of the state statutes regulating union shop agreements. Wisconsin could impose more restrictive regulations upon union shop agreements than those imposed by the Taft-Hartley Act for the plain reason that Congress in Section 14(b) expressly said the states could do so. The *Algoma* case is no authority whatsoever for post Taft-Hartley regulation of union unfair labor practices as to which no such specific provision exists.

The necessary inference to be drawn from Section 14(b), when read in conjunction with the cession proviso of Section 10 (a), is that the states may prevent conduct constituting unfair labor practices under the Taft-Hartley Act *only* when cession has taken place pursuant to the pro-

visions of the statute. Congress would not otherwise have (1) designated a special tribunal to enforce the federal policy, (2) specified the method by which that board may cede some of its power to the states, and (3) indicated the specific field where state legislation was to prevail.

This Court's concern with the duplication of the exclusive federal remedy has been repeatedly revealed. This Court said in *Algoma Plywood and Veneer Company v. W. E. R. B.*, 336 U. S. 301, 306: ♥

"\* \* \* Section 10 (a) was designed \* \* \* to preclude conflict in the administration of remedies for the practices proscribed by Section 8."

Wisconsin here enjoined practices proscribed by Section 8. In *Garner v. Teamsters Union*, 346 U. S. 485, this Court said at 498:

"The conflict lies in remedies, not rights."

And in *Weber v. Anheuser-Busch*, 348 U. S. 468:

"In *Garner*, the emphasis was not on two conflicting labor statutes but rather on two similar remedies, one state and one federal, brought to bear on precisely the same conduct."

This similarity in remedies is exactly the case here.

This Court thus has ruled that the federal remedy for preventing unfair labor practices is exclusive and that the states may not, in regulating such conduct, impinge upon that remedy. This result has obtained whether the attempted state regulation is based on a state labor statute or grounded elsewhere. The State's action in this case fails both tests. (1) It constitutes enforcement of state



labor policy; (2), it constitutes regulation which almost exactly duplicates the federal procedure and remedy. Although we do not agree with the result reached in *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656, the holding in that case is consistent with the position advanced by appellant here and, indeed supports the result for which we urge. In the *Laburnum* case, recovery of damages in a common law tort action was allowed, although the union's conduct on which the action was based (which entailed violence) was also an unfair labor practice under the Taft-Hartley Act. That case thus seems to support a state remedy against union unfair labor practices having no parallel in any federal remedy; to-wit:

"\* \* \* the violent conduct was reached by a remedy having no parallel in, and not in conflict with, any remedy afforded by the federal Act." (Italics added; *Weber v. Anheuser-Busch*, 348 U. S. 468, 477.)<sup>\*</sup>

The clear inference is that the state is without jurisdiction to regulate violent conduct where the state remedy has a parallel in the Federal Act (to the extent, as is the case here, of substantially duplicating it), and that the state procedure survives only if there is no conflict with the federal remedy. Thus, the Court said in *Laburnum*:

"To the extent that Congress prescribed preventive procedure against unfair labor practices, \* \* \* [the Garner] case recognized that the Act excluded conflicting state procedure to the same end. \* \* \* The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a

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<sup>\*</sup> The federal remedy being preventive rather than remedial. Here the WERB orders appears to be preventive in the same sense as this court (in *Laburnum*) characterized the federal remedy.

recognition that if no conflict had existed, the state procedure would have survived." (Italics added; 347 U. S. 665.)

We have said the union's conduct is of the kind over which the federal board has powers of investigation and adjudication. This is all that is required to result in a holding that the State tribunals were without jurisdiction. The rule developed by this Court is that where the conduct involved reasonably falls within the sections of the federal statute prohibiting unfair labor practices, the State tribunal must decline jurisdiction, for it is the federal board which was empowered by Congress to determine in the first instance whether in fact, the conduct involved comes under the prohibitions (or the protection) of the federal act. The Court said in *Garner v. Teamsters Union*, 346 U. S. 485 at 490:

"Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order."

See also *Weber v. Anheuser-Busch*, 348 U. S. 468, 478; *Local Union No. 23 v. N. Y., New Haven and Hartford R. R. Co.*, ... U. S. ..., 76 Sup. Ct. 227, 231.

The point is that it is the federal board which is empowered in the first instance to determine whether or not the union's conduct is prohibited as an unfair labor

practice.<sup>9</sup> Until then, it is sufficient that the conduct claimed *may be* a violation of 8 (b) (1) (a). It follows that the state tribunals must be prohibited from assertion of jurisdiction except following a National Labor Relations Board determination that *none*, or only *some*, of the conduct involved is either protected or prohibited by the Federal Act.

## II.

**The Allen-Bradley and Briggs-Stratton cases do not sanction application of a state labor act to conduct regulated by the federal labor act.**

We have argued that under general and well established principles of pre-emption, as applied by this Court to labor relations, Wisconsin clearly acted beyond its authority by applying its own preventive unfair labor practice remedy to the kind of conduct which the federal board is empowered to investigate and regulate. The only question which remains to be answered is whether a different result should obtain here because Wisconsin found the union's conduct to be coercive and violent. To support the claim for such an exception, *Allen-Bradley Local 1111 v. Wisconsin Board*, 315 U. S. 740, is frequently cited. Factually, the instant case is substantially similar to *Allen-*

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<sup>9</sup> This is also the answer to the claim which may be made that certain relief (such as limiting the number of pickets) granted by the State board may not be allowed by NLRB. Congress, by giving the federal board power in unfair labor practice cases to " \* \* \* issue \* \* \* an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action \* \* \* as will effectuate the policies of this Act" [29 U. S. C. 160 (c)] has indicated that such questions should also be resolved in the first instance by the federal board. It is, in any event, clear that the state may not in a state unfair labor practice proceeding *enlarge* upon the exclusive federal unfair labor practice procedure.

*Bradley*. Like *Allen-Bradley*, it is an action to enforce an order growing out of an unfair labor practice proceeding before the Wisconsin Employment Relations Board. The provisions of the Wisconsin labor relations statute on which the unfair labor practice order is based are the same as in *Allen-Bradley*. The nature of the union conduct claimed to violate the Wisconsin statute is substantially the same as in *Allen-Bradley*—i.e., coercive and violent action against employees to prevent them from working during a strike.

For these reasons, the Supreme Court of Wisconsin held, and appellees will here argue, that the federal pre-emption issue is the same as in *Allen-Bradley* and hence the decision below should be sustained.

There is one significant difference.<sup>10</sup> *Allen-Bradley* was decided in 1942. The federal statute upon which the union's entire claim of conflict with state law here rests did not even exist then. It was not passed until 1947.

That is, of course, a considerable difference. When *Allen Bradley* was decided, the Wagner Act was in effect. As noted, it prohibited employer unfair labor practices and provided a centralized administrative machinery for the protection of union and employee rights against such employer practices. There was no such thing as either federal substantive law or federal administrative procedure designed to control union unfair labor practices. Wisconsin's statute, on the other hand, while modeled on the federal act, regulated both employer and union unfair practices. The union did not argue in *Allen-Bradley* that

<sup>10</sup> There may be another difference. There was not, insofar as it appears from this Court's opinion, any charge in the *Allen-Bradley* case that the company had committed unfair labor practices against the union and the employees which could be heard only by the Federal Board. See Point V below, pp. 38-43.



Congress had taken in hand the kind of union unfair labor practice there alleged. It argued, to the contrary, that the state's prohibition of union coercion might interfere with union activities protected by the Wagner Act.

This Court did not find the argument persuasive. It found that the nature of the state regulation was not such as to interfere with union activities protected by the federal statute and it concluded that the *absence of federal regulation* of union unfair labor practices (in 1942) left the states free to regulate them. This Court characterized the basis of its holding in *Allen-Bradley* as follows:

"Congress has not made such employee and union conduct as is involved in this case subject to regulation by the Federal Board." 315 U. S. 740, 749.

Subsequent references by this Court to the *Allen-Bradley* decision also indicate that the basis for that decision was that Congress had in no wise attempted to regulate the conduct there involved, thus leaving the states free to enjoin it under state law. Thus, in *Hill v. Florida*, 325 U. S. 538, 539:

"Certain conduct, such as mass picketing, threats, violence, and related actions we held [in *Allen-Bradley*] were not governed by the *Wagner* Act, and hence, Wisconsin was free to regulate them." (Italics added.)

Recently, in *Weber v. Anheuser-Busch*, 348 U. S. 468, *Allen-Bradley* was explained as follows at 477:

"The Court held that such conduct was not subject to regulation by the federal Board, either by prohibition or by protection."

In 1947, the federal government enacted the Taft-Hartley Act. Labor Management Relations Act, 1947, 29 U. S. C. 141 ff. Union unfair labor practices were defined and the

National Labor Relations Board was given power to prescribe them. 29 U. S. C. 158 (b) and 160. Section 8 (b) (1) [29 U. S. C. 168 (b)(1)] was enacted providing that it was an unfair labor practice for a union or its agents to restrain or coerce employees in the exercise of their Section 7 rights. Congress thus made subject to the centralized administrative procedures of the National Board precisely the same kind of conduct which had previously been made subject (by paragraphs 111.06 (2)(a)(f), the parts of the Wisconsin statute here involved) to the administrative procedures of the state labor board.

Thus, we submit that the *Allen-Bradley* case is of no applicability here. We realize this Court has, since the passage of the Taft-Hartley Act, continued to cite the *Allen-Bradley* case. These citations, it will be argued, show to that the passage of the Taft-Hartley Act did not change the holding of the Court in *Allen-Bradley* that Wisconsin's statute is valid. The instances, however, in which *Allen-Bradley* has been cited since 1947 are quite consistent with our contention that, in the light of the Taft-Hartley Act, Wisconsin's labor relations regulation cannot survive.

*Allen-Bradley* stands for the proposition that the states may continue to regulate aspects of union conduct which are not regulated by the Federal Act. There may remain truth in that proposition. But the proposition has no application when the aspect of union conduct which was regulated by Wisconsin in *Allen-Bradley* is subsequently regulated by federal statute. The passage of the Taft-Hartley Act may not have destroyed the general proposition of law upon which *Allen-Bradley* rested. It certainly made that proposition inapplicable here.

*Allen-Bradley* has also been cited by this Court for another proposition—the right of the states to continue to exercise their “historic powers over such traditionally regulated matters as public safety and order and the use of streets and highways.” 315 U. S. 740, 749, quoted in *Garner v. Teamsters Union*, 346 U. S. 485, 488. This proposition, too, remains valid but also is inapplicable. The federal statute may not prevent the states from enforcing their traditional policies which do not involve a weighing of the social interests involved in labor relations matters even though those policies happen to be applied in a labor-management controversy. Thus, the states may find liability for acts of violence and take appropriate police measures to prevent their recurrence, whether the violence occurs in connection with a strike, a political rally or in Joe’s bar. In such cases, the state is enforcing its policy against disturbances of the peace, not its policy relating to strikes, its policy relating to political matters, or its policy relating to the dispensing of alcoholic beverages. On the other hand, regulation which has as its basis a decision by the state that a particular kind of union activity should be restrained, or permitted only under certain conditions, is a matter of labor policy and cannot be enforced if the parties are subject to the Federal Act. Congress has pre-empted this field and closed it to state regulation.

We believe that the recent citations of *Allen-Bradley* by this Court indicate only that the states may exercise their traditional police powers to restrain breaches of the peace or other action which violate state policy, whether or not that action occurs in connection with a labor controversy. But that proposition does not control this case.

The case at bar does not represent an attempt by the state to enforce criminal laws of general applicability in the exercise of police power for the maintenance of the

public peace or the regulation of traffic, or to take similar traditional measures cutting across labor relations laws. This case represents the enforcement, by the State, of its *labor relations statute*, the so-called Employment Peace Act, in the form of an administrative unfair labor practice proceeding. It is a case in which the State of Wisconsin, reserving its generally applicable police powers, has established a *labor policy*, pursuant to which it applies special remedies and invokes special procedures in cases in which coercive actions take place in a labor controversy.

The Wisconsin Employment Peace Act, as is plain on its face, does not express the State's general policy against violence or intimidation or breaches of the peace. Nor, contrary to what may be argued, is it a general regulation of the streets and highways of the State of Wisconsin. The Wisconsin Employment Peace Act expresses the decision of the State as to the proper method of conducting strikes and other labor controversies, and provides administrative procedures, comparable to those contained in the federal labor statute, by which the State's labor policy may be enforced. We submit that the *Garner* case and the *Anheuser-Busch* case make it crystal clear that such state regulation must fail when applied to controversies over which Congress has assumed control.

This case is, indeed, almost precisely the same as the *Garner* case. All of the considerations present in the *Garner* case are present here. All of the arguments available to the employer in the *Garner* case are available here. And those arguments must fail here as they did in the *Garner* case.

There is but one difference. In *Garner*, the union unfair labor practice, which the state also interdicted, arose under Section 8 (b)(2) of the Taft-Hartley Act. Here the union



activities claimed would violate Section 8 (b)(1). Unlike 8 (b)(2), actions which violate 8 (b)(1) are actions which may in some cases also be punishable as violations of a state's general criminal law. That difference might very well be urged to support an application of a state's general criminal law against the claim of federal pre-emption. But the fact that this case involves matters which the police are empowered to regulate generally, while it may serve to sustain an exercise of that police power, cannot serve to sustain the additional exercise of the State's labor relations policy. Nor does the *Laburnum* case, previously discussed, authorize state regulation of violence in the form such regulation took here. As was said in *Weber v. Anheuser-Busch*, 348 U. S. 468, 477:

“\* \* \* the violent conduct [in *Laburnum*] was reached by a remedy having no parallel in, and not in conflict with, any remedy afforded by the federal Act.”

The plain inference is that the state is without jurisdiction to regulate violent conduct where the state remedy has a parallel in the Federal Act. And such a parallel plainly exists here.

Appellees can derive little comfort from this Court's decision in *UAW-AFL v. Wisconsin Employment Relations Board*, 336 U. S. 245 (the so-called *Briggs-Stratton* case). The union's conduct there enjoined under the state labor act was, in the view of this Court, neither protected nor forbidden by the Federal Act. We question the wisdom of this Court's *pre-judging* of that issue (following determination by state tribunals but without prior National Labor Board proceedings) and believe that under more recent decisions a different result might have been reached. But in any event, the holding in the *Briggs-Stratton* case is but an

application of one of the two propositions for which *Allen-Bradley* stands, namely, that a state may, under its labor act, continue to regulate union conduct not protected or prohibited by the Federal Labor Act. That proposition has no application when, as here, the conduct involved is subject to federal regulation. Neither the *Allen-Bradley*, nor the *Briggs-Stratton* case support state jurisdiction under a state labor statute over conduct which is also regulated by the Federal Labor Act.

### III.

The State may not duplicate the exclusive federal procedure for prohibiting unfair labor practices, whatever continued authority it may retain under its police power to prohibit or punish such conduct in the traditional manner by enforcing criminal laws of general applicability or other historic means.

Wisconsin reads recent decisions of this Court as reserving to the states police control over the prevention of breaches of the peace and related conduct in connection with labor disputes. The State says the type of conduct here prohibited would have been within state jurisdiction if engaged in by "unorganized private persons". Wisconsin will surely argue that Congress did not intend to confer immunity on labor organizations and their agents and members.

Appellant is not, however, claiming immunity here. We do not argue in this case that it is not within the authority of local government to proscribe the type of conduct here involved under laws regulating all persons, including unions, as well as "unorganized private persons". We are not aware that Wisconsin has made unions immune against the same laws relating to violence and breaches of the peace that apply to "unorganized private persons". Wisconsin

can continue to apply those laws to unions and to "unorganized private persons" alike.<sup>11</sup>

The question is whether the State may exercise its general historic powers to preserve the public peace by defining and enjoining unfair labor practices under a state labor act even though this is the kind of conduct which may also constitute unfair labor practices under the federal labor law. We do not believe that Wisconsin may impose such additional restrictions and provide such additional administrative remedies when unions and not "unorganized private persons" are involved, in order to execute its own policy as to the kind of remedy and the kind of controls that should apply to labor disputes. To find the definitive answer to this problem it is necessary to determine whether the attempted state regulation can be reconciled with the language and policy of the federal enactments. Chief Justice Stone, speaking for the Court in *Southern Pacific Co. v. Arizona*, 325 U. S. 761, gave the following analysis at 769:

"Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible, \* \* \* or exclude state regulation even of matters of peculiarly local concern which, nevertheless, affect interstate commerce."

It is necessary, thus, to turn to the Congressional intent to see whether state regulation as attempted by Wisconsin in this case was authorized by Congress. Repeated reiteration by appellees, like the incantation of some magic for-

<sup>11</sup> Indeed, Section 111.07 (1) of the Wisconsin Employment Peace Act clearly says that "nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction."

mula, that the State here was exercising its police powers cannot, in and of itself, be sufficient to warrant an intrusion upon a federally pre-empted field and the comprehensive federal legislative scheme.

We have already, in Section I of this Argument, described and discussed the crucial statutory language and this Court's view of it. It is evident that this Court has recognized that language as evincing Congress' intention to exclude state agencies from the enforcement of labor policy and from the duplication of the federal unfair labor practice remedy. Thus, the Court said in *California v. Zook*, 336 U. S. 725, 732:

"And when state enforcement mechanisms so helpful to federal officials are to be excluded, Congress may say so, as in the Taft-Hartley Act, 29 U. S. C. (Supp.), Section 160 (a), 29 U. S. C. Section 160 (a)."

It remains for us to examine the legislative history that went before the enactment of the Taft-Hartley amendments to the Wagner Act.

#### IV.

##### The Legislative History.

Appellees will doubtless rely on a statement made by Senator Taft with reference to Section 8 (b) (1), in response to the objection that enactment of that provision would subject unions to two remedies for the same act:

"There is no reason in the world why there should not be two remedies for an act of that kind." (2 Legislative History of the Labor Management Relations Act, 1947, 1031.)



They will doubtless rely on this and similar statements to support their arguments that Congress did not intend the result for which we here urge.

Let it be noted, however, that Senator Taft envisioned application of *two* remedies. Appellee's position in this case is that there be *three* remedies for the same conduct—the federal unfair labor practice remedy, the state unfair labor practice remedy, and such other legal or equitable relief as might be appropriate and available, the pursuit of which is specifically preserved by the Wisconsin act<sup>o</sup> [Section 111.07 (1)]. The legislative history does, indeed, appear to give some support to continued applicability of “State and local police laws”—as they are frequently referred to in the Senatorial debates. It does *not* support the continued validity of state labor relations procedures entailing, as they would, a *third* remedy for the same conduct.

The Senate debates make it quite clear that Senator Taft, in referring to the “law of the state” (2 *Legislative History of the Labor Management Relations Act, 1947*, 1031) and Senator Ball, in referring to “good local law enforcement” (2 *Legislative History Labor Management Relations Act, 1947*, 1200) intended to refer to the generally uniform state criminal laws covering all cases of physical violence, not to administrative procedures of state labor relations statutes.

The debate in the Senate over Section 8 (b)(1) revolved in the main around the objections of opposing Senators to any specific singling out of labor coercion for additional administrative handling when all violence, whether or not in conjunction with a labor dispute, was already subject to state criminal penalties. The proponents of Section 8 (b)(1) argued that the peace officers charged with enforcing such generally applicable criminal laws would be en-

couraged by the addition of a federal administrative procedure dealing, in part, with the same ground. Neither the opponents nor proponents of Section 8 (b)(1) assumed that state labor relations procedure *and* federal labor relations procedures would be imposed on the existing criminal law.

An examination of the Senate hearings on various proposals to amend the Wagner Act also reveals that what sponsors and supporters of amendments similar to 8 (b)(1), as finally enacted, were concerned with was the then supposed failure of local law enforcement in connection with labor disputes. For example, Mr. Gerard D. Reilly, a former National Labor Relations Board member and prominent supporter of Taft-Hartley, analyzed these provisions as follows:

"When the Wagner bill was reported to the Senate in 1935 similar proposals were rejected by the Senate committee on the ground that interference by labor organizers with employees amounted to a breach of local law and was punishable in local police courts. Experience of 11 years of administration with the statute has disproved this theory. . . ." (Hearings before the Committee on Labor and Public Welfare, U. S. Senate, 80th Congress, First Session on S. 55 and S. J. Res. 22, p. 303.)

To the same effect, Mr. Ira Mosher, Chairman of the Executive Committee of the National Association of Manufacturers:

"The failure of local law enforcement agencies to preserve individual rights has been one of the most disquieting developments of the post-war labor scene. In dozens, if not hundreds, of cases mass picketing has subjected thousands of individuals to force and violence exerted upon employees and the public alike. Men have been imprisoned within plants; office workers and factory workers alike have been terrorized . . ." (*Id.* p. 966.)

On the other hand, opponents to measures of this sort, pointed out that the Congress was seeking to prohibit conduct already subject to the local criminal laws. Indeed, the proponents apparently recognized the same thing, believing, however, that these local criminal laws were not being adequately enforced.<sup>12</sup>

There can, in any event be no doubt that, on the basis of these considerations, § (b)(1) was enacted into law and was intended to regulate conduct such as is involved in this case. Representative Hartley said of it:

"This bill \* \* \* does prohibit mass picketing and use of violence in the conduct of a strike." (1 Legislative History, p. 882. See also, 2 Leg. History, etc., p. 993.)

It could with some logic be argued from this that the federal remedy for the prevention of violence is *totally* exclusive and was intended to oust *all* other remedies, the Congress viewing the latter as inadequate and, therefore, enacting a federal procedure for the solution of a national problem. Whatever the merits of that contention, it seems in any event clear that proponents as well as opponents of this legislation had in mind at most the supplementation of local enforcement of the criminal laws by means of the federal unfair labor practice procedure. There is no indication that the references to local laws and their enforcement refer to anything other than the existing criminal law.

<sup>12</sup> Hearings before a Subcommittee of the Senate Committee on Education and Labor on H. R. 4908 (the so-called "Case bill") 79th Congress, 2d Session, reveal that this same concern with the supposed failure of effective local law enforcement was already alive in 1946. Thus, Section 11 of that bill contains a provision outlawing violence in labor disputes and making them subject to federal court injunctions. The discussions concerning that section clearly reveal them to be a response to the supposed ineffectiveness of local police law. See e. g. pages 14, 49, 115 of the record of the Hearings, *supra*.

This is shown very clearly in a speech by Senator Ives. After pointing out that Section 8 (b) (1) would make unions liable *twice* for the same offense, the Senator went on to point out that the existing state law remedies were more than adequate since the "effective remedy against such offenses is quick arrest, criminal trial, and conviction, not an administrative hearing \* \* \*" (2 *Leg. History, etc.* 1021). This makes clear what all assumed—that the repeated reference to existing state law and the police powers of the states, which would be duplicated by Section 8 (b) (1), were references to the general state criminal law against violence and coercion, not to state labor relations statutes.

We believe that the legislative history of the Federal Act, when considered as a whole, supports the claim of federal pre-emption made here.

## V.

### The Federal-State Conflict in This Case.

We have argued that Congress intended and this Court has held the federal procedures for the regulation of labor relations to be pre-emptive and exclusive in character, prohibiting substantive and procedural state measures that impinge upon the federal rules and remedies. We have also sought to demonstrate that, whatever may be the states' continuing authority to regulate mass picketing, threats of violence, etc., by enforcing criminal laws of general applicability and other historic measures, they may not, through the enforcement of *state labor policy* as declared in a State Labor Act, duplicate the exclusive federal procedure for prohibiting such unfair labor practices. The potential conflict between state and federal regulation provides the logical basis for the pre-emption doctrine. The soundness of



that doctrine is concretely illustrated in this case because here the potential conflict in jurisdiction has become actual.

Thus this very case demonstrates the confusion and potential undermining of the Congressional enactment which follows from state enforcement of its own labor relations policy in a controversy which is also subject to the federal law. In this case, the same strike has given rise to two unfair labor practice proceedings—one under the Federal Act and one under the Wisconsin Act—in which the same fact situation is being litigated.

There is no question that the dispute out of which this proceeding arises is subject to the Federal Act. Unfair labor practice proceedings under the Federal Act, arising from earlier events, were pending against the Kohler Company when the present strike began. N. L. R. B. had asserted jurisdiction over the Kohler Company in representation proceedings. See *Kohler Company*, 93 N. L. R. B. 398; *Kohler Company*, 108 N. L. R. B. 207; enforced, 220 F. 2d 3 (C. A. 7).

The very conduct here involved is also currently the subject of a National Labor Relations Board proceeding. The strike began on April 5, 1954. On April 15, the Kohler Company filed its complaint with the Wisconsin Employment Relations Board. That proceeding resulted in the order which is under attack in this case. Meanwhile, the union, on July 8, 1954, filed charges with the National Labor Relations Board that the company had failed to bargain collectively and had discriminatorily discharged certain employees and otherwise interfered with and coerced employees in the exercise of their statutory rights. After investigation, a complaint was issued against the company by the General Counsel of the Federal Board and the company answered. The matter went to hearing in

February, 1955. The hearings have as of the date of this writing not been concluded. *Matter of Kohler Co., N. L. R. B. Case No. 13-CA-1780.*

The fact that both the federal and state labor relations board are seeking to exercise jurisdiction over the same controversy is, we think, significant enough. But even more significant is the fact that the identical issues are being litigated before both tribunals.

One of the contentions of the union and the General Counsel of the National Labor Relations Board in the federal proceeding is that the Kohler Company has refused to bargain in good faith with the union. The company, answering this contention, claims that the union, by engaging in the same course of action complained of in the Wisconsin proceeding, has itself failed to bargain in good faith and that this failure excuses the company.

The company's contention in the federal proceeding is set forth clearly in the answer which it filed with the National Labor Relations Board in December, 1954, which states, in part as follows:

“[Respondent] further alleges that the Union was not bargaining in good faith in that beginning April 5, 1954, and continuing to date it engaged in, supported, urged and fostered coercive and illegal conduct, including interfering by force, threat, intimidation and mass pickets with persons desiring to pursue lawful work and employment for the respondent, attempting by such means to prevent lawful work or employment by persons desiring to work for the respondent; obstructing and interfering by mass pickets and by physical obstruction with the free and lawful use of public streets, and with the free and lawful use of entrances to and driveways leading to the plant of respondent, threatening them with physical injury, picketing their homes, follow-

ing and intimidating them on foot and in vehicles, subjecting them to harassing telephone calls, causing injury and damage to their homes and other property and to their persons, and by similar act and conduct all with the intent to force respondent to capitulate to the Union's demand as the price of securing discontinuance of said coercive and illegal conduct and accompanied by repeated statement by representatives of the Union that respondent could obtain relief from said illegal and coercive conduct by signing a contract satisfactory to the Union."<sup>13</sup>

The company has thus itself illustrated what is in any case plain: the Federal Act is an integrated whole. One cannot separate out parts of the conduct of one of the parties to a labor dispute and deal with it separately without destroying the scheme which Congress has established for the regulation of such disputes.

Picket lines are not conducted in a vacuum. Nor does bargaining take place without reference to what has happened on the picket line. Each act in a complex labor dispute is necessarily related to what has gone before and provides the basis for what will happen later. No particular aspect of the dispute can properly be seen when isolated from the whole dispute—either as a matter of life or as a matter of law.

The Federal Act recognizes these inter-relationships. Thus, the fact that an employer has engaged in unfair labor practices such as a refusal to bargain may, under the federal law, give reinstatement rights to employees who have engaged in coercive picket line conduct which would otherwise disqualify them. *N. L. R. B. v. Thayer Co.*, 213 F. 2d (C. A. 1, 1954), *cert. denied* 348 U. S. 883. And, on

<sup>13</sup> See Appendix "C" *infra*, pp. 17a, 18a, 23a, 24a, and 28a.

the other hand, the fact that violence has occurred on the picket line may, the company is contending before the federal board, excuse it from the duty to bargain which it would otherwise have.

All of these issues are necessarily inter-related. Congress has enacted a statute under which the entire controversy can be taken in hand, under which both parties can obtain adjudication before a single body of their claims of unfair action, each against the other, and under which the whole pattern of conduct of both sides can be evaluated.

Wisconsin, it is true, has also enacted such a statute. Under the Wisconsin statute it is an unfair labor practice for an employer to refuse to bargain in good faith or to discriminatorily discharge employees, or intimidate or coerce them, for engaging in concerted activities. And the Supreme Court of Wisconsin ruled in this case that the union could raise defenses, such as the maintenance of an arsenal by the company in the plant by itself instituting unfair labor practice proceedings against Kohler Company before the Wisconsin Board.

But it seems crystal clear that the union's charges against the Kohler Co. could not have been heard by the Wisconsin Board. The decisions of this Court clearly establish that the National Labor Relations Board has exclusive jurisdiction over those charges. *Plankinton Packing Co. v. Wisconsin Board*, 338 U. S. 953; *Garner v. Teamsters Union*, 346 U. S. 485. And, indeed, the union did include the maintenance of a weapons arsenal by the Company in its charge to the National Board that the Company had coerced and



restrained the employees in the exercise of their right in collective action.<sup>14</sup>

The net result of the exception to the general pre-emption doctrine which appellees contend for is, therefore, an artificial division of the issues in dispute. As to the issue of coercion by the union, the Kohler Company has its choice of labor tribunals. It can file charges either with the Federal board or the Wisconsin board—depending upon its own judgment as to the effectiveness of the relief offered and the chances of success in each. But the union cannot so shop—even as to its charges on issues integrally related to the issue before the Wisconsin Board. These other issues, their relationship to the claimed coercion, and indeed the factual redetermination of the coercion issue itself are all subject to adjudication in the proceeding before the National Labor Relations Board.

The question here, then, is whether Wisconsin may continue to enforce its own labor policy with respect to the single issue of union coercion, in splendid isolation from the other issues, even though: (1) that policy duplicates the federal policy, (2) the issue of coercion is integrally inter-related with other issues arising out of the same dis-

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<sup>14</sup> The union alleged, in part:

"The company through its president, Herbert V. Kohler, admitted the possession and the presence upon the premises of the company plant, of guns, clubs and other forms of ammunition, as a means of interfering with, restraining, coercing, or discouraging the employees in the exercise of their rights to engage in concerted activities.

"A few days thereafter, on or about May 30, 1954, the Sheriff of Sheboygan County removed from the company premises the ammunition including tear gas, heretofore kept by the company as a means of coercing the employees, and as a threat of reprisal upon them." (See R. 30.)

pute which only the federal board can decide and (3) the coercion issue is itself subject to different determination in the procedure Congress has provided for the whole dispute. We think it plain that this kind of truncated and Balkanized adjudication should not be permitted to stand in the face of the Federal Act.<sup>15</sup>

### CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed.

HAROLD A. CRANEFIELD,  
*Counsel for Appellant.*

MAX RASKIN,  
WILLIAM F. QUICK  
KURT L. HANSLOWE,  
REDMOND H. ROCHE, Jr.,  
*Of Counsel for Appellant.*

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<sup>15</sup> It may be argued that none of the proceedings before the National Labor Relations Board is of record in this case and cannot therefore be considered by the Court. The short answer to this objection is that the NLRB record is a public one of which, we believe, we may properly advise this Court. Further, an examination of the chronology will reveal that there is no conceivable way by which the facts concerning the actual conflict could have been made a part of the record in this case. The Wisconsin board filed its order in May of 1954. Kohler Company did not raise the facts, concerning which WERB ruled, before NLRB until December, 1954. The actual conflict in this case is, in any event, significant only because it illustrates the wisdom of the pre-emption doctrine which is designed to avoid potential conflict.

## APPENDIX A

## WISCONSIN STATUTES 1953

## Section 111.04 (page 1905):

"111.04 *Rights of employees.* Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

## Section 111.06 (2) (a) (f) (page 1907):

"(2) It shall be an unfair labor practice for an employe individually or in concert with others:

(a) to coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

(f) To hinder, or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

## Section 111.07 (page 1908):

"111.07 *Prevention of unfair labor practices.* (1) Any controversy concerning unfair labor practices

may be submitted to the board in the manner and with the effect provided in this subchapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction."

## APPENDIX B

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### NATIONAL LABOR RELATIONS ACT; 61 STAT. 140 ff, 29 U. S. C.

Section 157; Section 158 (b)(1), Section 160 (a) and (j):

"Sec. 157. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

"Sec. 158 (b). It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances;"



"Section 160 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith."

"Section 160 (j). The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper."

"Section 164 (b). Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

**APPENDIX C****EXCERPTS FROM PLEADINGS IN N. L. R. B. UNFAIR  
LABOR PRACTICE CASE No. 13-CA-1780**

UNITED STATES OF AMERICA .

Before the

**NATIONAL LABOR RELATIONS BOARD  
THIRTEENTH REGION**In the Matter of Kohler Co.,  
Respondent,

and

Local 833, UAW-CIO, International  
Union, United Automobile, Aircraft and Agricultural Implement  
Workers of America,  
Charging Party.Case No.  
13-CA-1780.**COMPLAINT**

It having been charged by Local 833, UAW CIO, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, hereinafter referred to as the Union, that Kohler Co. a corporation, hereinafter called the Respondent, has engaged in and is now engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, hereinafter called the Act, the General Counsel of the National Labor Relations Board, hereinafter referred to respectively as the General Counsel and the Board, on behalf of the Board, by the Regional Director for the Thirteenth Region, designated by the Board's

Rules and Regulations, Series 6, as amended, hereby issues this Complaint and alleges the following:

1. A copy of the charge was duly served upon the Respondent on July 13, 1954; a copy of the first amended charge was duly served upon the Respondent on October 5, 1954; and a copy of the second amended charge was duly served upon the Respondent on October 16, 1954.

2. The Respondent is now and at all times material herein has been a corporation duly organized and existing by virtue of the laws of the State of Wisconsin, with its principal office and place of business located at Kohler, Wisconsin, and with offices located in the States of Massachusetts, Illinois, Ohio, Michigan, Texas, California, Minnesota, New Jersey, New York, Pennsylvania, Missouri, Oregon, and in London, England. It is engaged in the manufacture and sale of plumbing fixtures, heating equipment, electrical appliances, air cooled engines and precision parts. Its principal plant for the manufacture of the foregoing products is located in Kohler, Wisconsin, which plant is hereinafter referred to as the Plant.

3. The Respondent in the course, conduct and operation of its business at all times material herein, has continuously caused materials used by it in its business to be purchased and transported in interstate commerce directly to the Plant at Kohler, Wisconsin, from and through States of the United States other than the State of Wisconsin. During the year 1953, the value of such materials was in excess of \$1,000,000.

Respondent in the course, conduct and operations of its business at all times material herein, has continuously caused quantities of its products manufactured in the Plant to be sold, shipped and transported in interstate commerce from the Plant in Kohler, Wisconsin, into and through States of the United States other than the State of Wisconsin.

During the year 1953, the value of such products was in excess of \$1,000,000.

4. Respondent is and at all times material herein has been engaged in commerce, and its operations affect and have affected commerce within the meaning of Section 2 (6) and (7) of the Act.

5. The Union is, and at all times material herein, has been a labor organization within the meaning of Section 2 (5) of the Act.

6. All production and maintenance employees of the Respondent's Kohler, Wisconsin plant, including shop office stenographers, American Club employees, all employees described in the October 23, 1950 Supplement "B" of the contract executed on August 31, 1950 between Respondent and the Kohler Workers' Association and all employees described in Supplement "F" of the contract, including employees doing experimental work in the development department, but excluding general office and clerical employees, draftsmen, technicians, clerks in the medical department, employees in the employment department, doctors, dentists, nurses, engineers, employees in the chemical and physical laboratory, confidential employees, watchmen, guards and supervisors as defined in the Act, constitute, and at all times material herein have constituted a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 (a) and (b) of the Act, which appropriate unit is hereinafter referred to as the Unit.

7. On June 10 and 11, 1952, pursuant to a Stipulation for Certification upon Consent Election in Cases 13-RM-127 and 13-RC-2673, a majority of the employees in the Unit designated the Union as their representative for the purposes of collective bargaining with the Respondent. The



Union at all times since those dates, by virtue of Section 9 (c) of the Act, has been and is now the exclusive bargaining representative of all employees in the Unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment.

8. Respondent by its officers, agents and representatives, while engaged in the course and conduct of its business at the Plant, on or about July 1, 1954 discriminatorily discharged the following employees:

(Names of 52 employees omitted.)

and at all times thereafter and to the date hereof has discriminatorily failed and refused and continues to fail and refuse to reinstate the above employees, or any of them, all for the reason that they and each of them had joined or assisted the Union, or had otherwise engaged in concerted activities for the purposes of collective bargaining or other mutual aid and protection.

9. Respondent by its officers, agents and representatives has failed and refused and continues to fail and refuse to bargain with the Union by engaging in the following acts:

(a) On or about April 5, 1954, the Respondent put into effect a wage increase without any negotiation with, consultation with or notice to the Union, the exclusive representative of the employees in the Unit;

(b) On or about June 29, 1954, the Respondent broke off bargaining negotiations with the Union, refused to continue to engage in such negotiations and refused to meet with the Union;

(c) On or about July 1, 1954, Respondent discharged the employees of the shell department who were out on strike and transferred the employees of the shell department who were not out on strike to other departments of the Respondent, all this without negotiation with, consultation with, or prior notification to the Union, the exclusive bargaining representative of the employees in the Unit;

(d) On or about August 18, 1954, Respondent broke off bargaining negotiations with the Union, refused to continue to engage in such negotiations, and refused to meet with the Union.

10. By the acts set forth in paragraph 9 hereof and by each of them( Respondent has failed and refused and continues to fail and refuse to bargain with the Union, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

11. By the acts set forth in paragraph 8 hereof, and by each of them, the Respondent did discriminate and is discriminating regarding the hire, tenure, terms and conditions of employment of its employees and did thereby discourage and is thereby discouraging membership in the Union and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

12. By the acts set forth in paragraphs 8 and 9, and by each of them, Respondent did interfere with, restrain, coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8 (a)(1) of the Act.

13. The acts of the Respondent set forth in paragraphs 8 and 9 hereof, and each of them, occurring in connection with the operations of the Respondent set forth in paragraphs 2 and 3 hereof, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

14. The acts of the Respondent set forth in paragraphs 8 and 9 hereof, and each of them as specified, constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3) and (5) and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Thirteenth Region, on this 26th day of October 1954, issues this Complaint against Kohler Co., a corporation, the Respondent herein.

Dated at Chicago, Illinois, this 26th day of October-1954.

Ross M. Madden,  
Regional Director,  
Thirteenth Region,  
176 West Adams Street,  
Chicago 3, Illinois.

## COMPLAINT AS AMENDED

(Title and Venue same)

It having been charged by Local 833, UAW CIO, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, hereinafter referred to as the Union, that Kohler Co. a corporation, hereinafter called the Respondent, has engaged in and is now engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, hereinafter called the Respondent, has engaged in and is now engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, hereinafter called the Act, the General Counsel of the National Labor Relations Board, hereinafter referred to respectively as the General Counsel and the Board, on behalf of the Board, by the Regional Director for the Thirteenth Region, designated by the Board's Rules and Regulations, Series 6, as amended, hereby issues this Complaint and alleges the following:

1. A copy of the charge was duly served upon the Respondent on July 13, 1954; a copy of the first amended charge was duly served upon the Respondent on October 5, 1954; and a copy of the second amended charge was duly served upon the Respondent on October 16, 1954.

2. The Respondent is now and at all times material herein has been a corporation duly organized and existing by virtue of the laws of the State of Wisconsin, with its principal office and place of business located at Kohler, Wisconsin, and with offices located in the States of Massachusetts, Illinois, Ohio, Michigan, Texas, California, Minne-



sota, New Jersey, New York, Pennsylvania, Missouri, Oregon, and in London, England. It is engaged in the manufacture and sale of plumbing fixtures, heating equipment, electrical appliances, air cooled engines and precision parts. Its principal plant for the manufacture of the foregoing products is located in Kohler, Wisconsin, which plant is hereinafter referred to as the Plant.

3. The Respondent in the course, conduct and operation of its business at all times material herein, has continuously caused materials used by it in its business to be purchased and transported in interstate commerce directly to the Plant of Kohler, Wisconsin, from and through States of the United States other than the State of Wisconsin. During the year 1953, the value of such materials was in excess of \$1,000,000.

Respondent in the course, conduct and operations of its business at all times material herein, has continuously caused quantities of its products manufactured in the Plant to be sold, shipped and transported in interstate commerce from the Plant in Kohler, Wisconsin, into and through States of the United States other than the State of Wisconsin.

During the year 1953, the value of such products was in excess of \$1,000,000.

4. Respondent is and at all times material herein has been engaged in commerce, and its operations affect and have affected commerce within the meaning of Section 2 (6) and (7) of the Act.

5. The Union is, and at all times material herein, has been a labor organization within the meaning of Section 2 (5) of the Act.

6. All production and maintenance employees of the Respondent's Kohler, Wisconsin plant, including shop office stenographers, American Club employees, all employees described in the October 23, 1950 Supplement "B" of the contract executed on August 31, 1950 between Respondent and the Kohler Workers' Association and all employees described in Supplement "F" of the contract, including employees doing experimental work in the development department, but excluding general office and clerical employees, draftsmen, technicians, clerks in the medical department, employees in the employment department, doctors, dentists, nurses, engineers, employees in the chemical and physical laboratory, confidential employees, watchmen, guards and supervisors as defined in the Act, constitute, and at all times material herein have constituted a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 (a) and (b) of the Act, which appropriate unit is hereinafter referred to as the Unit.

7. On June 10 and 11, 1952, pursuant to a Stipulation for Certification upon Consent Election in Cases 13-RN-127 and 13-RC-2673, a majority of the employees in the Unit designated the Union as their representative for the purposes of collective bargaining with the Respondent. The Union at all times since those dates, by virtue of Section 9 (c) of the Act, has been and is now the exclusive bargaining representative of all employees in the Unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment.

7A. By the commission of unfair labor practices on and before April 5, 1954, as set out in sub-paragraphs 9(c) and 9(f) hereof the Respondent provoked and caused the

Union to go on strike, and by unfair labor practices committed on April 5, 1954 and thereafter as set out in paragraphs 8 and 9 hereof (references to each including all subparagraphs) Respondent caused the said strike to be continued and prolonged continuously at all times thereafter.

8 (a) Respondent by its officers, agents and representatives, while engaged in the course and conduct of its business at the Plant, on or about July 1, 1954 discriminatorily discharged the following employees:

(Names of 52 employees omitted.)

and at all times thereafter and to the date hereof has discriminatorily failed and refused and continues to fail and refuse to reinstate the above employees, or any of them, all for the reason that they and each of them had joined or assisted the Union, or had otherwise engaged in concerted activities for the purpose of collective bargaining or other mutual aid and protection.

(b) In and about the month of December, 1954, Respondent discriminatorily served notices of eviction upon the following striking employees, and upon each of them, residing in premises owned and maintained by the Respondent, for the reason that each of them had joined or assisted the Union:

Henry Arnoldi, Carl Faas, Ervin Siech, Peter Gasser, Frank Novak, John Siech, and Walter Siech.

(c) On or before January 1, 1955, Respondent discriminatorily evicted its employees, Ervin Siech, John Siech and Walter Siech, and on or about January 1, 1955, discriminatorily evicted employees Peter Gasser and Frank Novak from premises in which they resided and which were

owned and maintained by the Respondent for the reason that each of said employees had joined or assisted the Union.

(d) Respondent by its officers, agents and representatives while engaged in the course and conduct of its business at the Plant, on or about March 1, 1955, discriminatorily discharged the following employees:

(Names of 78 employees omitted.)

and at all times thereafter and to the date hereof has discriminatorily failed and refused and continues to fail and refuse to reinstate the above employees, or any of them, all for the reason that they, and each of them, had joined or assisted the Union, engaged in union activities, or had otherwise engaged in concerted activities for the purpose of collective bargaining for their mutual aid or protection.

9. Respondent by its officers, agents and representatives has failed and refused and continues to fail and refuse to bargain with the Union by engaging in the following acts:

(a) On or about April 5, 1954, the Respondent put into effect a wage increase without any negotiation with, consultation with or notice to the union, the exclusive representative of the employees in the Unit;

(b) On or about June 29, 1954, the Respondent broke off bargaining negotiations with the Union, refused to continue to engage in such negotiations and refused to meet with the Union;

(c) On or about July 1, 1954, Respondent discharged the employees of the shell department who were out on strike and transferred the employees of the shell department who were not on strike to other



departments of the Respondent, all this without negotiation with, consultation with, or prior notification to the Union, the exclusive bargaining representative of the employees in the Unit;

(d) On or about August 18, 1954, Respondent broke off bargaining negotiations with the Union, refused to continue to engage in such negotiations, and refused to meet with the Union.

(e) On or about January 20, 1954 and February 6, 1954 and thereafter, Respondent refused to give, or unreasonably delayed giving to the Union, information on pay rates of employees in the Unit which had been requested by the Union.

(f) From February 1954 to date, the Respondent engaged in a course of surface bargaining with the Union, although requested by the Union at all such times to engage in genuine collective bargaining, in that Respondent unreasonably delayed and interrupted negotiations, participated in negotiations with the adamant purpose of undermining the status of the Union as the bargaining representative of the employees in the Unit, and demonstrated an irrevocable determination to frustrate and defeat the statutory goals of collective bargaining as defined in Section 8(d) of the Act.

(g) On or about February 21 and March 1, 1955, Respondent failed and refused to bargain with the Union, upon request of the Union, with respect to the identity of employees whom the Company considered ineligible for reinstatement upon termination of the strike and failed and refused to bargain with the Union concerning the employment status of said employees at a time when the question of such employ-

ment status constituted a necessary incident to the settlement of the existing strike; and since that time Respondent has failed and refused, and continues to fail and refuse to bargain with the Union concerning such matters.

(h) Respondent, in response to a request by the Union to bargain concerning the employees Respondent considered as having engaged in violence, retaliated by discriminatorily discharging the employees set forth in paragraph 8 (d) above.

10. By the acts set forth in paragraphs 8 and 9 (reference to each including all subparagraphs) hereof and by each of them, Respondent has failed and refused and continues to fail and refuse to bargain with the Union, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

11. By the acts set forth in paragraph 8 hereof, and by each of them, the Respondent did discriminate and is discriminating regarding the hire, tenure, terms and conditions of employment of its employees and did thereby discourage and is thereby discouraging membership in the Union and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

12. By the acts set forth in paragraphs 8 and 9, and by each of them, Respondent did interfere with, restrain, coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

13. The acts of the Respondent set forth in paragraphs 8 and 9 hereof, and each of them, occurring in connection with the operations of the Respondent set forth in paragraphs 2 and 3 hereof, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

14. The acts of the Respondent set forth in paragraphs 8 and 9 hereof, and each of them as specified, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a)(1), (3) and (5) and Section 2 (6) and (7) of the Act.

#### AMENDED ANSWER TO AMENDMENTS ENLARGING COMPLAINT

(Title and Venue same)

Now comes Kohler Co., Respondent herein, by William F. Howe and Lyman C. Conger, its attorneys, and for amended answer to "Amendments Enlarging Complaint" issued herein by Ross M. Madden, Regional Director, Thirteenth Region, National Labor Relations Board, on the third day of December, 1954, admits, denies, alleges and submits as follows:

1. Denies the allegations of added sub-paragraphs (e) and (f) of paragraph 9 of the amended complaint.

*Further alleges that the union was not bargaining in good faith in that beginning April 5, 1954, and continuing to date it engaged in, supported, urged and fostered coercive and illegal conduct including interfering by force, threats, intimidation and massed pickets with persons desiring to pursue lawful work and employment for the Re-*

*spondent, attempting by such means to prevent lawful work or employment by persons desiring to work for the Respondent; obstructing and interfering by massed pickets and by physical obstructions with the free and lawful use of public streets and with the free and lawful use of entrances to and driveways leading to the plant of respondent; assaulting persons desiring to pursue their lawful work for Respondent, threatening them with physical injury, picketing their homes, following and intimidating them on foot and in vehicles, subjecting them to harassing telephone calls, causing injury and damage to their homes and other property and to their persons, and by similar acts and conduct all with the intent to force Respondent to capitulate to the union's demands as the price of securing discontinuance of said coercive and illegal conduct, and accompanied by repeated statements by representatives of the union that Respondent could obtain relief from the said illegal and coercive conduct by signing a contract satisfactory to the union. (Italics added.)*

2. Denies that Respondent has failed and refused or continues to fail and refuse to bargain with the union or has engaged or is engaging in any unfair labor practices within the meaning of Section 8 (a) (5) of the Labor Management Relations Act.

3. Denies that Respondent has discriminated or is discriminating regarding the hire, tenure, terms and conditions of employment of its employees within the meaning of Section 8 (a) (3) of said Act.

4. Denies that Respondent has interfered with, restrained or coerced, or is interfering with, restraining or coercing its employees in the exercise of their rights guaranteed in Section 7 of said Act.



5. Denies that the acts of Respondent alleged in the complaint, as amended, or any acts of Respondent have tended or tend to lead to labor disputes, burden or obstruct commerce or the free flow of commerce.

6. Denies that the acts of Respondent set forth in paragraphs 8 and 9 of the complaint, as amended, or any acts of Respondent constitute unfair labor practices affecting commerce within the meaning of Sections 8 (a) (1), (3) and (5) or Section 2 (6) and (7) of the Labor Management Relations Act.

This amended answer is filed in view of the "Memorandum and Order on Motion of the General Counsel to Strike" and the "Memorandum and Order on Respondent's Motion to Strike Certain Allegations of Amendments Enlarging Complaint" both issued by the Trial Examiner on the 17th day of December 1954; the "Order on Motion of the General Counsel to Strike" issued by the Trial Examiner on November 23, 1954, and the "Order" issued by Frank M. Kleiler, Executive Secretary by direction of the Board December 9, 1954.

In view of said rulings the affirmative defense presented in that part of Respondent's original answer following paragraph 13 thereof is not re-presented herein for the reason that it has been ruled upon. Its omission from this answer is without any intent to waive said defense,

concede the correctness of the rulings thereon, nor waive any right of review or appeal from said rulings.

Respectfully submitted,

Kohler Co., Respondent,

By: William F. Howe /s/

Lyman C. Conger,

Attorneys.

Dated: December 22, 1954

William F. Howe,  
Gall, Lane and Howe,  
401 Commonwealth Building,  
Washington 6, D. C.

Lyman C. Conger,  
c/o Kohler Co.,  
Kohler, Wis.

State of Wisconsin,  
County of Sheboygan—ss:

L. L. Smith, being first duly sworn, on oath says that he is the Vice President of Kohler Co., a corporation, respondent in the above entitled action, that he has read the foregoing answer and that the same is true to his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

L. L. Smith.

Subscribed and sworn to before me this 22nd day of December, 1954.

Edward J. Hammer,  
Notary Public, Sheboygan County, Wisconsin.  
My commission expires November 25, 1956.

AMENDED ANSWER FOR KOHLER CO.,  
RESPONDENT

(Title and Venue same)

Now comes Kohler Co., Respondent, and answering the complaint, as amended December 3, 1954, and May 27, 1955:

(1) Admits the allegations of paragraphs numbered 1, 2, 3, 4 and 5 of the complaint.

(2) Admits that on February 26, 1951, in case No. 13-RC-1506, (93 NLRB 398), the National Labor Relations Board prescribed the bargaining unit for employees of Respondent which said designation has never been altered or revoked by said Board.

(3) Admits that on June 10 and 11, 1952, in cases Nos. 13-RM-127 and 13-RC-2673 a majority of the employees in the unit specified in paragraph 6 of the complaint designated the Union as their representative for the purposes of collective bargaining; and is without knowledge sufficient to plead to the allegations in paragraph numbered 7 of the complaint that at all times since such dates the Union has been, and now is, the exclusive bargaining representative of all employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment.

(4) Denies all of the allegations of paragraph numbered 7A of the complaint.

(5) Denies all of the allegations of paragraph numbered 8(a) of the complaint; and alleges that the employees listed in said paragraph numbered 8(a) of the complaint were temporary employees, hired for the dura-

tion of a defense contract with the Government of the United States of America; that it was understood and agreed, both by the said employees and by the Union, that the employment of said employees would terminate at the termination of said defense contract; that said defense contract was terminated by the Government of the United States of America as of June 30, 1954; that upon termination of said defense contract the employment of said employees was terminated in accordance with their contract of employment; and that all said employees have been offered reemployment.

(6) Denies all of the allegations of paragraphs numbered 8(b), 8(c) and 8(d) of the complaint.

(7) Admits that on or about April 5, 1954 Respondent put a wage increase into effect; but denies the allegations of paragraph numbered 9(a) of the complaint that said wage increase was put into effect without any negotiation with, consultation with or notice to the Union; and alleges that said wage increase was not put into effect until after the Union had refused it and an impasse in bargaining had been reached and a strike had been called by the Union.

(8) Admits that on or about June 29, 1954 collective bargaining negotiations by the Respondent and the Union were broken off; and alleges an impasse in bargaining had been reached due to the intransigent attitude of the Union its its insistence on full compliance of its bargaining demand; and further alleges that the Union was fostering, supporting, and engaging in coercive and illegal conduct in connection with the strike and therefore was not bargaining in good faith.

(9) Admits that on or about July 1, 1954 Respondent terminated employment of certain employees in the Shell Department, but denies the allegations in paragraph num-



bered 9(e) of the complaint that this was done without negotiation with, consultation with, or prior notification to the Union.

(10) Admits that on or about August 18, 1954 bargaining negotiations by the Respondent and the Union were broken off; and alleges an impasse in bargaining had been reached due to the intransigent attitude of the Union and its insistence on full compliance of its bargaining demand; and further alleges that the Union was fostering, supporting, and engaging in coercive and illegal conduct in connection with the strike and therefore was not bargaining in good faith.

(11) *Denies all the allegations of paragraphs numbered 9(e) and 9(f) of the complaint; and alleges that the Union was not bargaining in good faith in that beginning April 5, 1954, and continuing to date it engaged in, supported, urged and fostered coercive and illegal conduct including interfering by force, threats, intimidation and massed pickets with persons desiring to pursue lawful work and employment for the Respondent, attempting by such means to prevent lawful work or employment by persons desiring to work for the Respondent; obstructing and interfering by massed pickets and by physical obstructions with the free and lawful use of public streets and with the free and lawful use of entrances to and driveways leading to the plant of Respondent; assaulting persons desiring to pursue their lawful work for Respondent, threatening them with physical injury, picketing their homes, following and intimidating them on foot and in vehicles, subjecting them to harassing telephone calls, causing injury and damage to their homes and other property and to their persons, and by similar acts and conduct all with the intent to force Respondent to capitulate to the Union's demands as the*

*price of securing discontinuance of said coercive and illegal conduct, and accompanied by repeated statements by representatives of the Union that Respondent could obtain relief from the said illegal and coercive conduct by signing a contract satisfactory to the Union. (Italics added.)*

(12) Denies all the allegations of paragraphs numbered 9 (g) and 9 (h) of the complaint.

(13) Denies all the allegations of paragraphs numbered 10, 11, 12, 13, and 14 of the complaint.

And for other and further defenses to said complaint and the whole thereof as amended, Respondent alleges as follows:

(14) That the Union did not bargain in good faith with respect to rates of pay, wages, hours of employment and other conditions of employment but engaged in a course of surface bargaining in that:

(a) Since April 5, 1954, the Union was fostering, supporting, and engaging in coercive and illegal conduct in connection with the strike and was therefore not bargaining in good faith.

(b) The Union's bargaining was not directed to the legitimate purposes of collective bargaining, i. e., arriving at an agreement as to hours, wages and working conditions but to the promotion of class warfare and hatred, that union representatives and Robert K. Burkart, who was in charge of, directed and controlled the bargaining for the Union, in particular, were motivated by a strong anti-capitalist bias and a desire to perpetuate controversy, strife, friction and class warfare.

Pursuant to said motive the Union made extravagant and unrealistic demands, took unyield-

ing and intransigent position on said demands, and conducted a continuous and unremitting campaign of derogation and vilification of management.

(c) The real intent and purpose of the Union in bargaining and in the strike which it called on April 5, 1954, was not to arrive at an agreement on wages, hours, and conditions of employment but to force a change in the management of Respondent and to replace said management with a management which would be subservient to the Union's demands.

(d) The real intent and purpose of the Union in bargaining was not to arrive at an agreement on wages, hours and conditions of employment but to dictate the choice of Respondent's bargaining representative in violation of Section 8 (b) (1) (B) of the Act.

(15) That the charges were not filed in good faith by the charging party but were filed for the purpose of coercing Respondent into complying with the Union's bargaining demands and also for the purpose of delaying or preventing any election whereby the Union's status as bargaining representative might be challenged.

(16) That Robert Burkart is an officer of the UAW-CIO; that said Robert Burkart has been in charge of negotiations for the UAW-CIO; that said Robert Burkart has been in charge of the strike being called against the Respondent by the UAW-CIO; when the complaint in this case was issued by the National Labor Relations Board said Robert Burkart had not filed, and to this date has not filed

the affidavit required by Section 9 (h) of the National Labor Relations Act.

Respectfully submitted,

Kohler Co.,

Respondent,

By:.....

William F. Howe

.....  
Lyman C. Conger

Attorneys.

Dated:.....

William F. Howe,  
Gall, Lane and Howe,  
401 Commonwealth Building,  
Washington 6, D. C.

Lyman C. Conger,  
c/o Kohler Co.,  
Kohler, Wisconsin.



City of Washington,  
District of Columbia—ss.

Lyman C. Conger, being first duly sworn, on oath says that he is the Assistant Secretary of Kohler Co., a corporation, Respondent in the above entitled action, that he has read the foregoing answer and that the same is true to his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

.....  
Subscribed and sworn to before me this 2nd day of June,  
1955.

.....  
Notary Public.

My commission expires.....

**MOTION TO AMEND ANSWER FOR KOHLER CO.,  
RESPONDENT**

(Title and Venue same)

Now comes Kohler Co., Respondent, by its attorneys and moves to amend its answer as amended July 9, 1955, as follows:

1. Change paragraph number (6) of said answer to read as follows:

“(6) Denies all of the allegations of paragraphs number 8(b), 8(c) and 8(d) of the Complaint, and alleges that the individuals named in paragraph

*Appendix C*

numbered 8(d) of the Complaint were discharged for misconduct as follows:

Engaging or participating in picketing which was illegal, intimidating or coercive.

(75 names omitted)

Engaging or participating on conduct in connection with the strike which said conduct was unlawful, intimidating or coercive—

(51 names omitted)

Engaging in, participating in, instigating, directing, controlling or ratifying and supporting picketing which was illegal, intimidating or coercive and/or engaging in, participating in, instigating, controlling or ratifying and supporting conduct in connection with the strike, which said conduct was unlawful, intimidating or coercive and/or making and publishing or participating in the making and publishing of intimidating, threatening or coercive statements—

(14 names omitted)

And for other and further defense to paragraphs 7 and 8 of the Complaint Respondent alleges that the following have, since their discharge engaged in, participated in, instigated, directed, controlled or ratified and supported conduct in connection with the strike which said conduct was unlawful, intimidating or coercive and of such character

that the purposes of the act would not be served by any remedial order directing their reinstatement or back pay—

(22 names omitted).

Respectfully submitted,

Kohler Co., Respondent,

By: .....

William F. Howe

.....  
Lyman C. Conger

.....  
Edward J. Hammer

.....  
G. A. Desmond

Attorneys.

Dated: September 12, 1955.

William F. Howe,  
Gall, Lane and Howe,  
401 Commonwealth Building,  
Washington 6, D. C.

Lyman C. Conger,  
E. J. Hammer and  
G. A. Desmond,  
c/o Kohler Co.,  
Kohler, Wisconsin.

IN THE

RECEIVED  
OCT 11 1956  
HAROLD B. WILLEY, Clerk

# Supreme Court of the United States

OCTOBER TERM, 1955

No. 530

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL  
IMPLEMENT WORKERS OF AMERICA,  
AFFILIATED WITH THE CONGRESS OF  
INDUSTRIAL ORGANIZATIONS,  
UAW-CIO,  
Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD  
and KOHLER CO., a Wisconsin corporation,  
Appellees

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

## REPLY BRIEF ON BEHALF OF THE APPELLANT

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1955

— ♦ —  
**No. 530**  
— ♦ —

**UNITED AUTOMOBILE, AIRCRAFT AND AGRICUL-  
TURAL IMPLEMENT WORKERS OF AMERICA,  
AFFILIATED WITH THE CONGRESS OF  
INDUSTRIAL ORGANIZATIONS,  
UAW-CIO,  
Appellant,**

**vs.**

**WISCONSIN EMPLOYMENT RELATIONS BOARD  
and KOHLER CO., a Wisconsin corporation,  
Appellees**

— ♦ —  
**ON APPEAL FROM THE SUPREME COURT OF WISCONSIN**  
— ♦ —

**REPLY BRIEF ON BEHALF OF  
THE APPELLANT**

— ♦ —  
Appellant files the instant reply to emphasize certain particularly untenable aspects in appellees' position as revealed by their briefs.

## I.

## THE CONGRESSIONAL INTENT

Appellees attribute to us a concession that the conduct, as alleged by Kohler and as found by WERB actually occurred. We have not made that concession and have refrained from attacking the Wisconsin Board's findings only because this Court is not the appropriate tribunal to do so. Our contention is, rather, that we are entitled to have conduct of the kind claimed to have occurred investigated and regulated by the Federal Board. We are not conceding that NLRB would have necessarily made the same findings. Indeed, this obvious possibility of conflict is the basis of the pre-emption doctrine. Appellees do not further their case when they concede that NLRB might well regulate mass picketing differently from the way it is regulated by WERB. See *Perry Norwell Company*, 80 NLRB 225, 242; *District Council, AFL*, 95 NLRB 969, 999.

But it is, in any event, plain that Congress, in enacting the Taft-Hartley amendments, intended to extend federal regulation over the kind of conduct claimed in this case. Representative Hartley said of the Conference Bill that it " . . . does prohibit mass picketing and use of violence in the conduct of a strike." (1 *Legislative History of the Labor Management Relations Act*, 1947, page 882.) Thus, while Senator Ball might have said that "the mass picketing situation is not a major objective" he cites mass picket lines, assaults, and lack of courage of "many local police officials" as the basis of the need for Section 8 (b)(1) of the Act (2 *Leg. History*, 1020). The fact that the Congress was concerned with non-violent forms of restraint and coercion hardly is a basis for arguing that there was no intent to regulate violence as well.



It is certainly beyond argument that the fundamental purpose of the Taft-Hartley amendments was to balance the Wagner Act by regulating labor organizations, as well as employers, and to regulate coercive conduct of labor organizations because it was believed local police officials frequently refused to proceed against trade unions. It is true that in this connection the continued validity of state laws was discussed but it becomes plain from a reading in context of references to state laws that these were references to the criminal laws. (See, for example, Senator Ball's statement, quoted on page 11 of WERB's brief that: "It is no wonder that local communities and *their peace officers* have been reluctant vigorously to enforce law . . . ." (Emphasis supplied.) He obviously did *not* have the Wisconsin Employment Relations Board in mind.)

There is an almost complete dearth of reference to state labor laws and state labor boards throughout the entire Congressional debates except in connection with the "cession proviso" contained in Section 10 (a), and Section 14 (b) which saved state labor laws regulating the union shop. These two provisions represent the legislative judgment as to how state labor laws were to be integrated with the federal statute. Senator Murray said of Section 10 (a):

"We believe that the clarification in the relations between Federal and State labor relations boards provided for in the bill represents a wise solution to a difficult problem." (2 Leg. History, 1166.)

At most, state labor acts such as the Wisconsin Employment Peace Act were models for the federal amendments. There is certainly no intimation that state labor boards would have concurrent jurisdiction over 8 (b)(1)(a) unfair labor practices but over no others. And it is conceded by appellees that the Wisconsin Act cannot be enforced within

the area of federal jurisdiction *except* as to the narrow area involved in this case.<sup>1</sup>

We recognize that the National Labor Relations Board does not have jurisdiction over such aspects of labor relations as workmen's or unemployment compensation. On the other hand, it seems to us plain from the Federal statutory scheme that unfair labor practices falling within the purview of the Act are to be subject to regulation by a central expert board and are to be treated in an integrated, rather than piecemeal, manner. *Garner v. Teamsters Union*, 346 U. S. 485, 490; *H. N. Thayer Co.*, 99 NLRB 1122, enforced 213 F. 2d 748, (C. A. 1, 1954), cert. denied 348 U. S. 883.

We have pointed out in our main brief (pages 38 to 44) the evils which flow from the piecemeal regulation of labor relations assayed by Wisconsin in this case. With respect to our "novel proposition" that we may advise the Court of a pending NLRB case in which substantially the same facts that formed the basis of the state proceeding are being adjudicated, we respectfully cite *Butler v. Eaton*, 141 U. S. 240; *Craemer v. Wisconsin*, 168 U. S. 124; *Chandler Laboratories, Inc. v. Smith*, 88 F. Supp. 583, 584 (D. C. E. D. Pa., 1950); *U. S. ex rel. Collins v. Ashe*, 90 F. Supp. 463 (D. C. W. D. Pa., 1950); *Pennsylvania v. Ashe*, 93 F. Supp. 542 (D. C. W. D. Pa., 1950); *Smith v. Maine*, 94 F. Supp. 688 (D. C. D. Me., 1951). See also *Wigmore on Evidence*, Vol. IX, Section 2579; *Wigmore's Code of Evidence* (3rd edition) p. 540.

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<sup>1</sup> References such as that of Representative Kersten quoted on page 8 of WERB's brief to "that portion which pertains to the validity of State laws" are plainly references to Sections 10 (a) and 14 (b), the "portion" pertaining to state laws.

## II.

**THE STATE BOARD ORDER SUBSTANTIALLY DUPLICATES THE  
ORDER NLRB WOULD HAVE ENTERED HAD CHARGES  
BEEN FILED AND PROVEN BEFORE IT**

Appellees make a strenuous, albeit abortive effort to show that there is little, if any, impingement by WERB on NLRB's jurisdiction. They claim that the Wisconsin statute here involved is actually a general police measure designed to protect all the people rather than a labor statute. But an examination of the Wisconsin Statutes reveal that the Chapter here involved is entitled, "Employment Relations" and the Sub-chapter, "The Employment Peace Act". Needless to say, the Wisconsin Statutes also include a comprehensive Motor Vehicle Law and Criminal Code.

Appellees also argue that WERB either did or at least *could* engage in regulation which would be beyond the powers of the Federal Board. Thus they note that the Wisconsin Act contains proscriptions against individual employees and "any person", whereas, the Federal Act regulates labor organizations and their agents. But, the section of the Wisconsin Act applying to "any person" [Section 111.06 (3)] was not invoked in this case and the State Board's order is directed against "Respondent Unions, their officers, members and agents". If Wisconsin had wanted to avoid conflict with the Federal Board it should have limited its regulation to individual employees and persons who were not agents of a labor organization.

Wisconsin argues (on pp. 60 ff of its Brief) that it was protecting "persons in their legal rights" rather than employees in their rights under Section 111.04 (which duplicates Section 7 of the Federal statute). But the Wis-

consin Board's conclusions of law (R. 8) find violations of Section 111.06 (2)(a) which, in turn, refers back to the provision corresponding to the Federal Section 7. Is Wisconsin seriously claiming that the "legal rights of persons desiring to be employed by Kohler Company" do not include statutory rights of employees similar or identical under State and Federal law. We submit that an examination of the Wisconsin Board's Conclusions and Order clearly reveals that their main thrust is directed towards the protection of employee rights identical to employees' Federal statutory rights. To say WERB's action in this case constitutes primarily protection of the public peace and regulation of traffic is to put the "cart before the horse". These may be incidental consequences of the protection of employee rights. As a matter of fact, the same would be true of a similar NLRB order.

### III.

#### THE DECISIONS OF THIS COURT

In conclusion we note that appellees persist in citing *Allen-Bradley*, *Briggs-Stratton*, and the *Algoma* case for propositions they do not support. *Allen-Bradley* and the *Briggs-Stratton* case both involved conduct not regulated by the Federal Act. That is not the case here. The *Algoma* case involved the Union Shop sections of the Wisconsin Act which the Federal Act (in Section 14 b) expressly saves.

In the instant case, the State attempted to regulate a subject matter regulated by the Federal Act in a manner and by a remedy substantially identical with the Federal remedy. Hence, Wisconsin's action cannot stand.



We shall not burden this Reply Brief by analyzing and distinguishing all the cases cited by appellees in which this Court has upheld state regulation of Interstate Commerce. We note simply that none of these involved an attempt by a state to regulate subject matter regulated by the Federal Government, and to do this by remedies and procedures substantially similar to the Federal remedies and procedures. That is the situation here, and that being so, the Court should apply its well-established rule that where Congress has taken a subject matter in hand and indicated the substantive and procedural law for its regulation, the states may not regulate the same subject matter in duplication or complementation of, or in opposition to, the Federal Law. We quote from *Southern R. Co. v. Railroad Commission*, 236 U. S. 439 cited at p. 39 of Kohler's Brief:

"The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the state had any jurisdiction of a subject over which Congress had exerted its exclusive control."

See also *Houston v. Moore*, 5 Wheat. 1; *Charleston & Carolina R. v. Varnville Co.*, 237 U. S. 597; *Oregon Washington R. Co. v. Washington*, 270 U. S. 87; *Missouri Pacific R. Co. v. Porter*, 273 U. S. 341; *Kelly v. Washington*, 302 U. S. 1.

Respectfully submitted,

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*Of Counsel for Appellant.*

DEC 15 1955

HAROLD B. WILLEY, Clerk

In The  
**Supreme Court of The United States**

October Term, 1955

No. 530

UNITED AUTOMOBILE, AIRCRAFT AND AGRI-  
CULTURAL IMPLEMENT WORKERS OF  
AMERICA, AFFILIATED WITH THE CONGRESS  
OF INDUSTRIAL ORGANIZATIONS, UAW-CIO,  
*Appellant,*

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD  
and KOHLER CO., a Wisconsin corporation,  
*Appellees.*

**MOTION OF APPELLEE WISCONSIN EMPLOYMENT  
RELATIONS BOARD TO DISMISS APPEAL**

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In The  
**Supreme Court of The United States**

October Term, 1955

**No. 530**

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, UAW-CIO,  
*Appellant,*

*vs.*

WISCONSIN EMPLOYMENT RELATIONS BOARD  
and KOHLER CO., a Wisconsin corporation,  
*Appellees.*

**MOTION OF APPELLEE WISCONSIN EMPLOYMENT  
RELATIONS BOARD TO DISMISS APPEAL**

Appellee Wisconsin Employment Relations Board, pursuant to Rule 16 of the Revised Rules of this court, respectfully moves to dismiss the appeal in the above entitled case on the ground that it does not present a substantial federal question.

## I.

THE ACTION OF THE STATE COURT OF WHICH REVIEW IS SOUGHT IS THE SAME AS THAT AFFIRMED BY THIS COURT IN *ALLEN-BRADLEY LOCAL 1111 v. WISCONSIN E. R. BOARD*, (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154

The nature of the action of which review is sought is succinctly described in the following excerpt from the decision of the Wisconsin Supreme Court: (loc. cit. 269 Wis. 583-584, 70 N. W. 2d 194):

"The conduct which the Wisconsin Employment Relations Board found to be a violation of sec. 111.06, Stats., as unfair labor practices, is virtually the same conduct as that which it had found to be a similar violation in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board* (1941), 237 Wis. 164, 295 N. W. 791. The present order and injunction are essentially the same as those issued by the board and the court in the *Allen-Bradley Case*. The principal attack on it then, like the attack on the present order, was made on the ground that federal labor legislation has preempted the field and the National Labor Relations Board has exclusive jurisdiction over this controversy, which grows out of and affects labor relations. The enforcement order issued by the circuit court in the *Allen-Bradley Case* in all substantial particulars is the same as the one issued by the circuit court in the case at bar. We sustained the circuit court and the board on such jurisdictional questions and on their exercise of the jurisdiction and we were affirmed by the supreme court of the United States in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board* (1942), 315 U. S. 740, 62 Sup. Ct. 820, 86 L. Ed. 1154."

The law under which the judgment was entered, the findings upon which it was entered, and the restrictions imposed by it, are the same as those involved in the *Allen-Bradley case*, *supra*.

The nature of the conduct and the restrictions imposed are described in the words of this court in the case of *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 62 S. Ct. 820, 824, 86 L. ed. 1154:

"We are not under the necessity of treating the state Act as an inseparable whole. Cf. *Watson v. Buck*, *supra*. Rather, we must read the state Act for purposes of the present case as though it contained only those provisions which authorize the state Board to enter orders of the specific type here involved. That Act contains a broad severability clause. \* \* \*

"The only employee or union conduct and activity forbidden by the state Board in this case was mass picketing, threatening employees desiring to work with physical injury or property damage, obstructing entrance to and egress from the company's factory, obstructing the streets and public roads surrounding the factory, and picketing the homes of employees. \* \* \*

## II.

THIS COURT HAS SEVERAL TIMES INDICATED THAT STATE JURISDICTION AS TO MATTERS INVOLVED IN THE ALLEN-BRADLEY CASE HAS NOT BEEN REMOVED BY LATER ACTS OF CONGRESS

The appellant rests its assertion that the state has no jurisdiction to enjoin mass picketing, threats of violence, property damage, obstructions of highways, and similar conduct, upon the fact that the *Allen-Bradley case* was

decided "long before the Taft-Hartley Act prohibited such conduct as union unfair labor practices."

This court has, however, in at least four cases decided since the enactment of the Taft-Hartley Act, recognized that jurisdiction over this type of conduct still rests with states. In *Garner v. Teamsters Union*, (1953) 346 U. S. 485, 488, 74 S. Ct. 161, 98 L. ed. 228, it was said:

"\* \* \* We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.' *Allen-Bradley Local v. Wisconsin Board*, 315 U. S. 740, 749. Nothing suggests that the activity enjoined threatened a probable breach of the state's peace or would call for extraordinary police measures by state or city authority. \* \* \*"

This court said in *International Union, etc. v. O'Brien*, (1950) 339 U. S. 454, 459, 70 S. Ct. 781, 95 L. ed. 978:

"\* \* \* That activity we regarded as 'coercive,' similar \* \* \* to the labor violence held to be subject to state police control in *Allen-Bradley Local v. Wisconsin Board*, 315 U. S. 740 (1942). \* \* \*"

In *International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651, the following appears:

"It seems to us clear that this case falls within the rule announced in *Allen-Bradley* that the state may police these strike activities as it could police the strike activities there, because 'Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board.

\* \* \*



In the latter case, decided under the provisions of the Taft-Hartley act, this court commented that, policing of "actual or threatened violence to persons and property" is left wholly to states," and that "no one questions the states' powers to police coercion accomplished by means of injury to property and threats to employees."

In *Weber v. Anheuser-Busch, Inc.*, (1955) 348 U. S. 468, 75 S. Ct. 480, the court said:

"4. On the other hand, in the following cases the authority which the State exercised was found not to have been exclusively absorbed by the federal enactments.

"In *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 10 LRRM 520, the State was allowed to enjoin mass picketing, threats of bodily injury and property damage to employees, obstruction of streets and public roads, the blocking of entrance to and egress from a factory, and the picketing of employees' homes. The Court held that such conduct was not subject to regulation by the federal Board, either by prohibition or by protection."

In a more recent case, *United Workers v. Laburnum Corp.*, (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025, this court again recognized the areas for state jurisdiction which were described in the excerpt from the *Garner* case by saying:

"\* \* \* The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived. \* \* \*

---

\*loc. cit. 336 U. S. 253.

In support of its decision, the court quoted the following statement by Senator Taft, made before a Senate Committee when the Taft-Hartley Act was under consideration, indicating that it was intended that there might be both a state and federal remedy for certain types of coercive conduct such as threats of physical violence:

"But suppose there is duplication in extreme cases; suppose there is a threat of violence constituting violation of the law of the State. Why should it not be an unfair labor practice? \* \* \*

### III.

#### IF THE STATE HAS JURISDICTION OF THE SUBJECT MATTER IT IS NOT LIMITED TO CRIMINAL PROCESS

The appellant suggests that the words of the *Garner* case, *supra*, recognizing the right of a state to exercise "its historic powers over such traditionally local matters as public safety and order and the use of streets and highways" would limit states to proceeding by criminal prosecution. The precise contention was rejected by this court in *Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board*, (1949) 336 U. S. 301, 69 S. Ct. 584, 587, 93 L. ed. 691, where the court said:

"\* \* \* It argues that the grant to the National Labor Relations Board of 'exclusive' power to prevent 'any unfair labor practice' thereby displaced State power to deal with such practices, provided of course that the practice was one affecting commerce. But this argument implies two equally untenable assumptions. One requires disregard of the parenthetical phrase

(listed in section 8); the other depends upon attaching to the section as it stands, the clause 'and no other agency shall have power to prevent unfair labor practices not listed in section 8.'

"The term 'unfair labor practice' is not a term of art. having an independent significance which transcends its statutory definition. The States are free (apart from pre-emption by Congress), to characterize any wrong of any kind by an employer to an employee, whether statutorily created or known to the common law, as an 'unfair labor practice.' \* \* \*

The reference in the more recently decided *Garner* case to "historic powers over such traditionally local matters" as public safety has no tendency to modify the decision of the *Algoma* case. The reference in the *Garner* case is to "powers" and "matters"; not to "remedies" and "procedures." If a state has the *power* to regulate a certain matter, there is no limit to the *methods* it may use, under its police power, to deal with that subject matter. Surely if regulation of conduct is sufficiently related to the public welfare to be within the power of the state to punish through criminal penalties, it would be an anomalous rule to say that the state may *punish* but not *prevent*. If conduct is contrary to the public welfare, surely it is preferable to prevent it wherever possible, than to wait for it to do its harm and then to punish.

This court has enumerated among proper areas for state regulation "threatened violence to persons or destruction of property."\* Surely regulation of "threatened" action implies prevention.

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\*loc. cit. 336 U. S. 253.

## IV.

CONGRESS HAS PROVIDED NO METHOD FOR DEALING ADEQUATELY WITH SUCH LOCAL EMERGENCIES AS BREACHES OF THE PEACE AND TRAFFIC OBSTRUCTIONS. IT DID NOT INTEND THAT SUCH CONDUCT SHOULD BE, IN EFFECT, APPROVED BY WITHDRAWING IT FROM LOCAL REGULATION

In the case of *United Workers v. Laburnum Corp.*, (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025, this court indicated that Congress intended that states should continue to have regulatory powers in matters with respect to which federal preventive administrative procedures are "impotent or inadequate," and with respect to conduct which the state "would have undoubted jurisdiction" to regulate if it had been followed by "unorganized private persons."

Those two conditions are met in this case. Not only does the National Labor Relations Board have no "express power"\* to prevent the type of conduct here involved; but it has no practical means to do so, as is demonstrated by the record in this case. The appellant has pointed out that an unfair practice complaint was filed with the National Labor Relations Board on April 12, 1954, and that it has not yet been acted upon. It is impossible for a single agency to prevent depredations of the kind involved in this case, which may flare up without warning in a community a thousand miles away.

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\*loc. cit. 346 U. S. 488.



Surely Congress did not intend that a community should suffer from highways obstructed by mass picketing, threats of physical injury and property damage, picketing of homes, and similar conduct, for periods of weeks, to say nothing of years.

Secondly, the type of conduct here prohibited would have been undoubtedly within state jurisdiction if engaged in by "unorganized private persons."

It has happened not infrequently that groups of people have banded together to picket theaters or public buildings because they disagreed with the views expressed by playwrights, actors, or speakers. Certainly those groups would not be permitted to prevent others from patronizing a lawfully conducted entertainment or meeting, by the kind of tactics involved in this case. It would be not only within the authority of the local government, but it would be its duty, to prevent such situations. Surely it was not intended by Congress to confer immunity upon a single segment of the population.

When the cry of "confusion" is raised in cases of this nature, it ordinarily comes from persons seeking to avoid regulation altogether. Surely no "confusion" can arise through prevention of unlawful conduct by the government agency best able to deal with it, when it is agreed by both federal and state governments that the conduct is inimical to public peace and contrary to our traditions of freedom.

Real confusion would arise if persons who are injured, or whose legal rights have been invaded, should appeal to their governmental officers for protection and learn that—

though both federal and state governments deplore the conduct—the wrongful acts are, for all practical purposes, protected because no agency has both the power and the means to deal with them.

Respectfully submitted,

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SUPREME COURT, U.S.

FILED

DEC 18 1955

THOMAS B. WILLEY, Clerk

IN THE  
Supreme Court of the United States

October Term, 1955

No. 550

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL  
IMPLEMENT WORKERS OF AMERICA, AFFILIATED  
WITH THE CONGRESS OF INDUSTRIAL ORGANIZA-  
TIONS, UAW-CIO, Appellant,

WISCONSIN EMPLOYMENT RELATIONS BOARD and  
KOHLEN Co., a Wisconsin corporation, Appellees.

On Appeal from the Supreme Court of Wisconsin.

MOTION OF APPELLEE KOHLEN CO. TO  
DENY REPEAL.

JOHN F. LANE

WILLIAM F. HOWE

THOMAS B. WILLEY

CLERK OF COURT

Attorneys for Appellee

Respectfully,  
Submitted,

01.01.56

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1955

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No. 530

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UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL  
IMPLEMENT WORKERS OF AMERICA, AFFILIATED  
WITH THE CONGRESS OF INDUSTRIAL ORGANIZA-  
TIONS, UAW-CIO, *Appellant*,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD and  
KOHLEK Co., a Wisconsin corporation, *Appellees*.

---

On Appeal From the Supreme Court of Wisconsin

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**MOTION OF APPELLEE KOHLER CO. TO  
DISMISS APPEAL**

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**COUNTERSTATEMENT OF THE CASE**

The order of the Wisconsin Employment Relations  
Board which has been enforced by the Wisconsin

Supreme Court directed appellant Union, its Local 833, and their officers, members and agents to cease and desist from:

- "1. Coercing and intimidating any person desiring to be employed by the Kohler Company in the enjoyment of his legal rights, intimidating his family, picketing his domicile, or injuring the person or property of such persons or his employee."
- "2. Hindering or preventing by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of lawful work or employment by any person desirous of being employed by the Kohler Company."
- "3. Obstructing or interfering in any way with entrance to and egress from the premises of the Kohler Company."
- "4. Obstructing or interfering with the free and uninterrupted use of public roads, streets, highways, railways or private drives leading to the premises of the Kohler Company."

In addition appellant Union and the other appellants in the state Supreme Court were directed to take the following affirmative action:

- "1. Limit the number of pickets around the Kohler Company premises to a total of not more than 200, with not more than 25 at any one entrance. Such pickets are to march in single file and to at all times maintain a space at least 20 feet in width at each entrance to the Kohler Company premises over which pickets will not pass and on which persons either on foot or in conveyance may freely enter or leave the premises without interference."

The Supreme Court of Wisconsin concluded that the State Board's findings of fact underlying the foregoing order were in all respects supported by substantial evidence and that the order was an appropriate remedy for the unlawful conduct disclosed by the State Board's findings. These conclusions of the State Supreme Court are not challenged here.

Before this Court the sole ground advanced for reversal of the state court judgment is the asserted fact that the Union conduct involved lies within the exclusive regulatory power of the National Labor Relations Board. This appellee concedes that the federal question thus presented was adequately raised before the State Board and before the State Circuit and Supreme Courts.

This appellee further concedes that its operations affect commerce within the meaning of Section 2 (7) of the National Labor Relations Act; as amended.

#### **THE EXTENT OF THE FEDERAL QUESTION PRESENTED**

Concededly some, but not all, of the conduct prohibited by paragraphs numbered 1 and 2 of the cease and desist portion of the State Board's order would be prohibited by the National Labor Relations Act as amended, and therefore, a remedy for such conduct would be afforded by Section 8 (b) (1) (A) of that Act.

With respect to paragraphs numbered 3 and 4 of the cease and desist portion of the State Board order it is submitted that no parallel remedy exists under the federal act. The National Labor Relations Board has no regulatory power over the use of state roads or highways as such. Of course, where the use of highways and roads is denied to employees as a means of



coercing them in the exercise of rights guaranteed by Section 7 of the Act, the Board has power to prohibit the continuance of the coercive tactics. Here, however, paragraphs 3 and 4 of the State Board Order are unrelated to coercion of employees. They are concerned solely with the regulation of the use of streets and highways lying within the State of Wisconsin. Regulatory authority over these matters is conferred on the State Board by Wisconsin Statutes, 1953, Section 111.06 (2) (f), which provides that:

“(2) It shall be an unfair labor practice for an employee individually or in concert with others:

\* \* \*

(f) . . . to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.”

The fact that the state has elected to deal with these activities by denominating them an unfair labor practice and vesting jurisdiction over them in its Employment Relations Board is, we believe, a matter of indifference. *Algoma Plywood & Veneer Corp. v. Wisconsin Board*, 336 U. S. 301. See also, *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468. So long as the state's regulation of the use of its streets and highways abridges no federally protected right, the state is free to act as it sees fit. *Schneider v. Irvington*, 308 U. S. 147, 160. Here, appellant does not contend in this Court, nor did it contend in the state proceedings, that the action of the state has interfered with the exercise of its right to publicize its dispute with this appellee. See, *Schneider v. Irvington, supra*. Indeed, that portion of

the State Board's order limiting the number of pickets to 200 at any one time would seem to preclude such an argument.

Accordingly, paragraphs 3 and 4 of the cease and desist portion of the decree enforced by the Supreme Court of Wisconsin are based on an adequate non-federal ground. As to them, the appeal should be dismissed for want of any federal question.

Turning to that part of the state court decree which directed appellants to limit the number of pickets around appellee's plant and placed certain other restrictions on the conduct of the pickets, it is sufficient, we believe, to point out that the National Labor Relations Board has held that this area is appropriate for state regulation and is, moreover, closed to regulation by the Board itself.

In *Cory Corporation*, 84 NLRB 972, 977 (1949), the Board said:

"... Legislative History supports the view that, in enacting this section [Section 8(b)(1)(A)], Congress also intended to prohibit conduct characterized by the popular term 'mass picketing.' These particular words, however, do not appear in the statute itself, and nowhere in the reports or debates is 'mass picketing' explicitly defined. The term must, therefore, be read in the context of Section 8 (b) (1) (A), which simply says that labor organizations shall not 'restrain' or 'coerce' employees. So read, it cannot be construed as contemplating that this Board shall affirmatively regulate the number of persons who may properly picket an establishment. That is primarily a matter for the local authorities. Our function, rather, as we see it, is limited to determining whether picketing as conducted in a given situa-

tion, whether or not accompanied by violence, "restrained" or "coerced" employees in the exercise of their rights guaranteed under the Act, and if so, to enjoin such conduct. In these circumstances, the number of pickets has relevance only as it tends to establish the potential or calculated restraining or coercive effect of massed pickets to bar nonstriking employees from entering or leaving the plant . . ."

Thus, the affirmative portion of the State Court decree rests upon an adequate non-federal ground, i. e., regulation of the use of streets and highways lying within the State of Wisconsin. As to this portion of the decree the appeal should also be dismissed for want of any federal question.

**NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY VIRTUE OF THE EXISTENCE OF A PARALLEL FEDERAL REMEDY WITH RESPECT TO CERTAIN ASPECTS OF THE STATE DECREE**

Appellant insists that this Court's decisions in *Garner v. Teamsters Union*, 346 U. S. 485; *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468; *General Drivers v. American Tobacco Co.*, 348 U. S. 978; *Plankinton Packing Company v. Wisconsin Board*, 338 U. S. 953; and *Building Trades Council v. Kinard Construction Company*, 346 U. S. 933, have now established that Congress intended to preempt completely the field of labor relations affecting interstate commerce by enacting the Labor-Management Relations Act of 1947. On this ground, appellant asks the Court to overrule, not only *Allen-Bradley Local 1111 v. Wisconsin Board*, 315 U. S. 740, but also *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656.

Failing that broadside attack on state regulatory authority, appellant argues that at least the states have

been deprived of the power to act through an administrative remedy which parallels a remedy available under the amended National Labor Relations Act.

It is important to note, however, that none of the cases on which appellant relies involved mass picketing, intimidation of employees, or the other acts of violence and coercion involved in this case. Moreover, in both the *Garner* and *Anheuser-Busch* opinions the Court was careful to point out that such conduct was not involved and to reaffirm the continuing right of the states to regulate activities of that type. And to these cases may be added *International Union v. Wisconsin Board*, 336 U. S. 245, 253; and *International Union of U. A. A. & A. v. O'Brien*, 339 U. S. 454, 459, where the Court also recognized the right of the state to prohibit concerted employee conduct amounting to a breach of the peace.

Appellant would evidently treat these various re-statements of the scope of state power over coercive tactics as mere judicial inadvertences—assuming perhaps that the Court was unaware of the existence of Section 8 (b) (1) (A) of the amended Act when it made them. We believe, on the other hand, that they represent a considered construction of the Act intended to forestall any doubts as to state authority in this area.

We submit further that the fact that this Court has uniformly relied upon *Allen-Bradley Local 1111*, as establishing the powers of the states in this area of coercive and violent conduct, has additional significance in connection with appellant's argument that the states may not deal with activity of this type by means of an administrative remedy which parallels the remedy afforded by the National Labor Relations Act. For in



*Allen-Bradley* the state had acted through precisely the same administrative and judicial machinery which was invoked in this case. Thus, we read the Court's numerous approving references to *Allen-Bradley*, not only as a recognition of the power of the state to regulate conduct such as is here in issue, but also as an endorsement of the exact remedy here utilized by the State.

Reason and common sense dictate the same result. Where Congress has, in fact, pre-empted a given area of the labor relations field, it is reasonable to assume that it also intends that its remedy shall be exclusive. See *Garner v. Teamsters Union, supra*. But where Congress has not pre-empted the regulated area, it is absurd to say that it has "pre-empted" the remedy or that it intends that its remedy shall be exclusive. Exclusiveness of remedy follows from substantive pre-emption; it cannot exist apart from it. See *Algoma Plywood and Veneer Co. v. Wisconsin Board*, 336 U. S. 301, 305-306.

**THE LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT SHOWS THAT CONGRESS DID NOT INTEND TO OUST THE STATES OF JURISDICTION OVER VIOLENT AND COERCIVE CONDUCT IN THE LABOR RELATIONS FIELD**

Section 8 (b) (1) of the National Labor Relations Act, as amended, was one of the most controversial sections of the 1947 amendments to the Wagner Act. As the Bill which ultimately became the Taft-Hartley Act was reported from the Senate Committee on Labor and Public Welfare, it contained no provision making it an unfair labor practice for a union to coerce or restrain employees in the exercise of rights guaranteed by Section 7. 1 Legislative History of the Labor

Management Relations Act 1947, P. 441. In a statement of Supplemental Views attached to the Committee Report, however, a minority of the Committee announced that they would seek to insert such a provision in the Bill by amendment on the Senate floor. *Id.* at P. 456. Summarizing their reasons for offering such an amendment, the Committee Minority stated (*Id.* at P. 456):

"The Committee heard many instances of union coercion of employees and their families in the course of organizing campaigns; also direct interference by mass picketing and other violence. Some of these acts are illegal under state law, but we see no reason why they should not also constitute unfair labor practices to be investigated by the National Labor Relations Board and at least deprive the violators of any protection furnished by the Wagner Act . . . ."

When the Bill (S. 1126) reached the floor, the proposed amendment was offered by Senator Ball of Minnesota for himself and Senators Byrd, George and Smith of New Jersey. 2 Legislative History of the Labor Management Relations Act 1947, P. 1018. It provoked an extensive debate in which the principal participants were Senators Ball and Taft, in support of the amendment, and Senators Morse, Ives and Pepper in opposition.

During the course of this debate most of the principal participants on both sides indicated plainly that the amendment was not intended to oust the states of jurisdiction over violent and coercive conduct. The amendment was viewed by all concerned as affording an alternative or supplementary remedy to any already available under state law.

Thus, Senator Taft, in a colloquy with Senator Pepper, made the following statement (Id. at P. 1031):

"... There are plenty of methods of coercion short of actual physical violence. So that in this section there is no duplication whatever. But suppose there is duplication in extreme cases; suppose there is a threat of violence constituting violation of the law of the state. Why should it not be an unfair labor practice? It is on the part of the employer. If an employer proceeds to use violence, as employers once did, if they use the kind of goon-squad tactics labor unions are permitted to use—and they once did—if they threaten men with physical violence if they join a union, they are subject to State law, and they are also subject to be proceeded against for violating the National Labor Relations Act. There is no reason in the world why there should not be two remedies for an act of that kind."

At a later date, Senator Ball, addressing himself to the question of the need for the amendment, made the following remarks (Id. at P. 1200):

"It is no wonder that local communities and their peace officers have been reluctant vigorously to enforce law when they saw the Federal Government was holding the unions exempt from any kind of Federal regulation. The only laws we have had restrain employers and not unions. So it may well be that many of the types of activities of unions which we are seeking to restrain somewhat by this mild amendment are the kind of activities which would be corrected by good local law enforcement. But I think we shall encourage that kind of law enforcement if the Federal Government, acting through Congress, states clearly its position that individual employees are entitled to their right of self-organization free from

coercion from any source, whether it be the employer, the union or some outside source."

Opposing the Ball amendment, Senator Ives showed that he understood it would have the same effect. The Senator said (Id. at P. 1021):

"Moreover, assuming that these proscribed acts involve violence and physical coercion, the provision is unnecessary because offenses of this type are punishable under State and local police law. In fact, the enactment of this provision would make unions and their agents liable twice for the same offense, once under State and once under Federal law. Employers run no such risk for interfering with their employees' rights."

With this statement Senator Morse expressed agreement. Id. at P. 1196.

Senator Murray—one of the leaders of the opposition to the Taft-Hartley Act in the Senate; though not a principal participant in the debate on the Ball amendment—had the same understanding of the effect of that amendment. Senator Murray inserted in the record a written analysis of the whole Bill, which included the following comment respecting the proposed Section 8 (b) (1) (Id. at P. 1578):

"Comment: The proposal contained in Section 8(b)(1) making it an unfair labor practice on the part of the unions and their agents to restrain or coerce employees in the exercise of rights guaranteed in Section 7 would lead to protracted litigation, because of the difficulty in determining who are agents of a labor organization and what constitutes restraint and coercion within its meaning. Moreover, assuming that these proscribed acts



involve violence and physical coercion, the provision is unnecessary because offenses of this type are punishable under State and local police laws. In fact, the enactment of this provision would make unions and their agents liable twice for the same offense, once under State and once under Federal law. Employers run no such double risk for interfering with their employees' rights. . . ."

Thus, throughout the debate on the so-called "Ball" amendment—which is now Sec. 8(b)(1) of the Act—it was the understanding of both the proponents and the opponents of the amendment that it would leave unimpaired the power of the states to deal with violent and coercive conduct on the part of the labor unions. As has been demonstrated this understanding of the effect of the amendment was brought to the attention of the full Senate on several occasions. Accordingly, it must be assumed that the amendment was adopted with this construction and this purpose in mind.

### CONCLUSION

Paragraphs numbered 3 and 4 of the cease and desist portion of the order of the State Board and that portion of the State Board's order which directed appellant to take certain affirmative action present no federal question for decision. As to them the appeal should be dismissed for that reason.

The remaining portions of the Board's order, as enforced, are clearly within the State's regulatory powers. Since the only reason advanced for reversal on this appeal is the alleged lack of jurisdiction in the State Board and Courts, the appeal with respect to

these portions of the order should be dismissed for want of a substantial federal question.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1955

No. 530

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IM-  
PLEMENT WORKERS OF AMERICA, AFFILIATED WITH  
THE CONGRESS OF INDUSTRIAL ORGANIZATIONS,  
UAW-CIO, *Appellant*,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD AND KOHLER  
Co., a Wisconsin corporation, *Appellees*:

On Appeal From the Supreme Court of Wisconsin

**SUPPLEMENTAL MEMORANDUM OF APPELLEE  
KOHLER CO., IN SUPPORT OF MOTION TO  
DISMISS APPEAL**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1955

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No. 530

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UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, UAW-CIO, *Appellant*,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD AND KOHLER Co., a Wisconsin corporation, *Appellees*.

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On Appeal From the Supreme Court of Wisconsin

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**SUPPLEMENTAL MEMORANDUM OF APPELLEE  
KOHLER CO. IN SUPPORT OF MOTION TO  
DISMISS APPEAL**

---

This supplemental memorandum is filed by Kohler Co., in response to certain arguments advanced by AFL-CIO in its brief amicus curiae in support of appellant's statement as to jurisdiction and in opposition to the motions to dismiss previously filed by appellees Wisconsin Board and Kohler Co.

Essentially, the entire statement of AFL-CIO seeks to establish a single proposition; i.e., that, while Sec.



8(b)(1) of the amended National Labor Relations Act leaves to the states the power to control violent and coercive union conduct by criminal prosecution or other similar means, it denies to them the power to control precisely the same conduct in the enforcement of the states' own labor policies. This general proposition underlies the AFL-CIO treatment of *Allen-Bradley Local 1111 v. Wisconsin Board*, 315 U.S. 740, *Algoma Plywood Co. v. Wisconsin Board*, 336 U.S. 301, the scope of the state's police powers, and the legislative history of Sec. 8(b)(1). Thus, the *amicus* brief is no more than a more extensive statement of the "remedial preemption" theory advanced by the appellant in its jurisdictional statement. As such, the *amicus* brief would not require separate response from the appellee.

AFL-CIO, however, has placed special emphasis on one aspect of the case which was not relied upon by appellant as a separate ground to support jurisdiction in this Court. At pages 10 to 14 of its brief, AFL-CIO takes the position that there is an actual and significant conflict between state and federal remedies in this case. To support this proposition, AFL-CIO makes extensive reference to the record currently being made in a proceeding before a Trial Examiner of the National Labor Relations Board in which this appellee is the respondent. *Matter of Kohler Co.*, NLRB Case No. 13-CA-1780. The record in that proceeding shows, AFL-CIO says (Brief at p. 10), that, "In this case the same strike has given rise to two unfair labor practice proceedings—one under the federal act and one under the Wisconsin act—in which the same issues are being litigated." Not only that, says AFL-CIO, but, "The very conduct here involved is also currently the

subject of a National Labor Relations Board proceeding." (Id. at p. 10).

There are two short answers to this contention advanced by amicus.

First, it is not accurate to say that the same issues are being litigated before the National Labor Relations Board as were litigated before the Wisconsin Board. As we have pointed out in our Motion to Dismiss, a substantial part of the decree ultimately issued by the state courts pertains to matters over which the National Labor Relations Board has no regulatory authority. Moreover, even with respect to those aspects of the controversy which may be subject to state and federal regulation, the issues before the federal Board are different from those presented to the state Board. The proceeding before the federal Board arises entirely out of charges filed against the Kohler Co. There is no way in which that proceeding can result in the allowance of affirmative relief to the Kohler Co., such as was obtained from the state Board. In addition, we wish to advise the Court that the issue of mass picketing and similar coercive tactics has been largely eliminated from consideration in the NLRB proceedings by stipulation between Kohler Co. and counsel for the Board's General Counsel. In effect, that stipulation recognizes that the Company acted within its rights in refusing to bargain with the Union during the period in which the mass picketing was being conducted.

The second and, we believe, conclusive answer to the AFL-CIO's suggestion of actual state-federal conflict in this case is the fact that none of the proceedings before the National Labor Relations Board is of record in this case.

We did not object to the incidental reference made by appellant (footnote 2 at p. 8 of appellant's Jurisdictional Statement) to the proceeding before the NLRB. We believe, however, that an entirely different question is presented by the attempt of the AFL-CIO to persuade this Court to note probable jurisdiction on the basis of factual allegations without any support in the record. This is tantamount, we submit, to requesting this Court to decide a case which is not before it for decision.

### CONCLUSION

To the extent that the argument advanced by AFL-CIO under the heading "The Federal-State Conflict in This Case" (Brief at pp. 10-14) rests on factual statements with respect to the pending proceedings before the NLRB, that argument is without foundation in the record on this appeal and should, therefore, be disregarded by the Court.

Respectfully submitted,

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HAROLD R. WILEY, Clerk

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WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS,  
UAW-CIO, *Appellant,*

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD and KOHLER  
Co., A Wisconsin Corporation, *Appellees.*

On Appeal From the Supreme Court of Wisconsin

**BRIEF FOR APPELLEE KOHLER CO.**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1955

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No. 530

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UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL  
IMPLEMENT WORKERS OF AMERICA, AFFILIATED  
WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS,  
UAW-CIO, *Appellant*,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD and KOHLER  
Co., A Wisconsin Corporation, *Appellees*.

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On Appeal From the Supreme Court of Wisconsin

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**BRIEF FOR APPELLEE KOHLER CO.**

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**QUESTIONS PRESENTED**

1. Whether state regulation of actual or threatened breaches of the peace is precluded because as an incidental effect of the state regulation rights guaranteed to employees by Sec. 7 of the National Labor Relations Act are protected and conduct which may violate Sec. 8(b)(1)(A) of that Act is prohibited?
2. Whether state regulation of violent and coercive conduct by labor unions and their agents, applied in the exercise of the state's police power, is precluded

because it overlaps to some extent federal regulation of the same conduct intended to enforce the guarantee of employee rights contained in Sec. 7 of the amended National Labor Relations Act?

3. Whether state regulation of violent and coercive conduct, a part of which is also subject to federal regulation as an unfair labor practice, is precluded where the legislative history of the federal regulation shows plainly that Congress intended to preserve state remedies against such conduct?

4. Whether the adoption by Congress of a partial remedy for violent and coercive conduct on the part of labor unions and their agents can be said to evince a Congressional intention to oust the states of the power to furnish a complete remedy against that type of conduct?

#### **STATEMENT OF THE CASE**

In June of 1952 appellant Union and its Local 833 were certified by the National Labor Relations Board as the collective bargaining representative of the production and maintenance employees of appellee Kohler Co. Thereafter, the Company and the Unions entered into a collective bargaining agreement which expired March 1, 1954 (R. 1).

When the parties were unable to agree upon the terms of a new contract the Union called a strike which commenced April 5, 1954 (R. 1). But this strike was not the ordinary concerted withholding of services and peaceful picketing of the employer's premises. From the outset the strike was conducted as an organized campaign of terror and violence intended to break the employer's resistance to the Unions' demands by force alone (R. 7-8).

Appellant admits, (Brief at p. 9) and the Supreme Court of Wisconsin found, that the conduct here involved is substantially similar to that involved in *Allen-Bradley Local 1111 v. Wisconsin Board*, 315 U. S. 740.

Massed pickets, stationed at the various entrances to the Company's plant forcibly prevented non-striking employees from entering or leaving the employer's premises. Streets and highways were blocked; non-striking employees attempting to enter the plant through the picket line were taken into custody by the pickets and compelled to go to the Union's strike headquarters where they were held captive. The homes of non-striking employees were picketed, and they themselves and their families were threatened with physical injury if they persisted in their attempts to work despite the strike (R. 7-8).

As a result, the Company initiated on April 15, 1954 a proceeding before the Wisconsin Employment Relations Board looking toward the issuance of an order terminating this unlawful conduct. The two unions, their officers, members and agents were named as respondents in that proceeding together with certain named individual representatives of the two unions (R. 7).

After a hearing the state Board found as facts that the various respondents had committed the unlawful acts described above (R. 7-8), and it issued an order directing the respondents to cease and desist therefrom (R. 9).

The case then went to the Circuit Court for Sheboygan County, Wisconsin, on the Board's petition for enforcement of its order and the Unions' cross-

petition for review (R. 5-12). That Court rendered a written opinion and judgment (R. 13-19), rejecting the Unions' various contentions, dismissing their petition for review, and enforcing the order of the Board without modification of any kind (R. 17-19).

Cross appeals were taken to the Supreme Court of Wisconsin and that Court, on May 3, 1955, rendered its opinion and judgment affirming in all particulars the action of the State Circuit Court (R. 19-31). 269 Wis. 578, 70 N. W. 2d 191.

Throughout the proceedings before the State Board and the State Courts appellant union and its correspondents have taken the position that the misconduct with which they were charged falls within the exclusive regulatory power of the National Labor Relations Board. The Wisconsin Supreme Court overruled this contention, holding in effect that this Court's decision in *Allen-Bradley Local 1111 v. Wisconsin Board*, 315 U. S. 740, had confirmed the power of the states to deal with conduct of the type here in question and that the enactment of the 1947 amendments<sup>1</sup> to the National Labor Relations Act (29 U.S.C. § 151, et seq.) had not altered the situation.

### SUMMARY OF ARGUMENT

1. Wisconsin here has prohibited conduct occurring in the course of a labor dispute which constitutes both actual and threatened breaches of the peace. In so doing Wisconsin has incidentally protected certain rights guaranteed to employees by Sec. 7 of the National Labor Relations Act, as amended [29 U.S.C.

<sup>1</sup> Labor-Management Relations Act, 1947, Title I; Act of June 23, 1947, Ch. 120, Title I, Sec. 101 et seq., 61 Stat. 136; 29 U.S.C. 151 et seq.



157], and has prohibited certain conduct which may violate Sec. 8(b)(1)(A) of that Act [29 U.S.C. 158(b)(1)(A)].

But Wisconsin's action goes far beyond the mere protection of rights guaranteed by Sec. 7 of the amended Federal Act and the prohibition of conduct which may violate Sec. 8(b)(1)(A) of that Act. In the exercise of its police power Wisconsin has prohibited the commission of acts of violence generally, the obstruction of its streets and highways, the blocking of ingress to and egress from the employer's plant, and has affirmatively regulated both the number of persons who may picket at any one time and the manner of their picketing. The National Labor Relations Board is not empowered to grant any of this relief.

We submit that since Wisconsin has acted primarily to preserve the peace, the fact that its action incidentally effectuates one aspect of federal labor policy does not divest the state of jurisdiction. *California v. Zook*, 336 U. S. 725; *United States v. Marigold*, 9 How. (U. S.) 560. Cf. *Union Brokerage Co. v. Jensen*, 322 U. S. 202; *Rice v. Board of Trade*, 331 U. S. 247.

2. We have noted that Wisconsin's regulation of the violent and coercive conduct here involved goes far beyond what the National Labor Relations Board is empowered to do by Sec. 8(b)(1)(A) of the amended National Labor Relations Act. But Wisconsin has not attempted to regulate conduct which the federal Act protects. *Allen-Bradley Local 1111 v. Wisconsin Board*, 315 U. S. 740.

In comparable circumstances this Court has uniformly upheld state regulation of conduct which is

neither prohibited nor protected by the National Labor Relations Act, as amended. *Allen-Bradley Local 1111 v. Wisconsin Board*, *supra*; *International Union v. Wisconsin Board*, 336 U. S. 245; *Algoma Plywood & Veneer Co. v. Wisconsin Board*, 336 U. S. 301. Cf. *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656. Thus, to the extent that Wisconsin's action reaches conduct which is unregulated by federal law, the State's regulation must be sustained.

3. The state, then, has jurisdiction over the subject matter of actual and threatened breaches of the peace in general. The National Labor Relations Board has regulatory authority over that narrow area of violent and coercive conduct which is encompassed within the terms that "It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Sec. 7 . . ."  
[Sec. 8(b)(1)(A), National Labor Relations Act, as amended; 29 U.S.C. 158(b)(1)(A)]

Thus,—as appellant apparently concedes (Brief at p. 29)—the state's authority in this area is substantially broader than is that of the National Labor Relations Board.

But, as a practical matter, there is no way that the state can exercise its power to preserve the peace and good order with respect to violence occurring in the course of a labor dispute without incidentally protecting certain rights guaranteed to employees by Sec. 7 of the federal Act and prohibiting conduct which may violate Sec. 8(b)(1)(A) of that Act. An illustration will demonstrate this; the right of the general

public to use the streets and highways within a state, and the right of the general public to be protected from mass breaches of the peace necessarily overlaps and includes the right of employees to be free from coercion and restraint in the exercise of their right to enter and leave the employer's premises despite the existence of a strike:—a right guaranteed by Sec. 7 of the National Labor Relations Act, as amended.

Hence, while it must be admitted that the state remedy includes the relief which could have been obtained from the National Labor Relations Board, the converse is not true. The federal remedy could not include many aspects of the state remedy, and, specifically, it could not include any protection of the rights of the general public.

Thus, appellant's argument comes to this,—because a partial remedy for the conduct disclosed by this record is available from the National Labor Relations Board, the State is to be precluded from granting full relief,—and the general public is to be left unprotected from mass lawlessness.

We submit, on the other hand, that a construction of federal law which effectively paralyzes the only agency capable of dealing completely with mass lawlessness must be avoided. The state regulation here should be upheld despite some duplication of federal regulation.

4. The legislative history of Sec. 8(b)(1)(A) of the National Labor Relations Act, as amended, shows plainly that Congress recognized that the remedy provided by Sec. 8(b)(1)(A) would be ineffective as a means of actually stopping an episode of mass picketing, and intended to preserve state remedies against such action. Sec. 8(b)(1)(A) was enacted primarily

to throw the moral force of the federal government behind state enforcement of remedies against mass picketing and other acts of violence and coercion.

Effectuation of this Congressional purpose requires that the state action here be upheld even to the limited extent to which it duplicates the remedy made available by Sec. 8(b)(1)(A) of the federal Act.

### ARGUMENT

I. The Applicable Provisions of the Wisconsin Employment Peace Act Constitute a Broad Prohibition of All Violence and Coercion Arising Out of Labor Disputes. Thus the State Regulation Has as Its Purpose the Preservation of Peace and Good Order During Labor Disputes. The Provisions of Sec. 8(b)(1)(A) of the National Labor Relations Act, on the Other Hand, are Narrowly Drawn so as to Preserve Only the Rights Guaranteed to Employees by Sec. 7 of That Act. For That Reason, the Federal Regulation Is Inadequate to Preserve Peace and Good Order and Should Not be Construed to Supersede the Duty of the State to Furnish That Protection to Its Citizens.

Appellant's contentions in this case raise questions striking at the most fundamental of all governmental powers,—the power of the state to preserve peace and good order and to protect its citizens from unlawful breaches of the peace.

Comparison of the federal and Wisconsin statutes shows that while Sec. 8(b)(1)(A) of the former is designed solely to protect employees against restraint of coercion by labor organizations and their agents, the provisions of the Wisconsin Act, upon which the order in issue is based, are designed to preserve peace and order in the community.

Sec. 8(b)(1)(A) of the National Labor Relations Act provides:

“Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—



"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . ."

Under that provision only labor organizations and their agents can commit unfair labor practices. Employees, union members, and other individuals are not subject to the prohibitions of Sec. 8(b)(1)(A) except where they engage in proscribed conduct as agents for a labor organization. *Sunset Line & Twine Company*, 79 NLRB 1487, 1507 (1948); *Perry Norvell Company*, 80 NLRB 225, 245 (1948).

Furthermore, the conduct ~~interdicted~~ by Sec. 8(b)(1)(A) constitutes an enjoinable unfair labor practice only when it restrains or coerces employees in the exercise of rights guaranteed by Section 7 of the federal Act. See *Local No. 67, IBT*, 107 NLRB 299, 304-305 (1953).

Sec. 111.06(2)(a) and (f) of the Wisconsin Employment Peace Act provides in pertinent part [Wisconsin Statutes, 1953, Sec. 111.06(2)(a) and (f)]:

"(2) It shall be an unfair labor practice for an employee individually or in concert with others:

"(a) to coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family.

\* \* \* \* \*

"(f) to hinder, or prevent by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of

public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

Sec. 111.06(3) provides that "it shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of . . . employees, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections . . . (2) of this section."

The Wisconsin Act is significantly different from the federal Act in these respects:

(1) It reaches the conduct of employees, union members and strangers to a particular labor controversy, in addition to the activities of labor organizations and their agents.

(2) It prohibits various activities, proscribed by Sec. 111.06(2)(a) and (f) without regard to whether such activities restrain or coerce employees in the exercise of rights guaranteed by Sec. 111.04 (the counterpart of Sec. 7 of the federal Act)..

The reason for the broad reach of the State law is found in Sec. 111.01(2), which, *inter alia*, states ". . . that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of third parties to earn a livelihood, transact business, and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint or coercion."

In short, the Wisconsin law is directly and primarily concerned with preserving peace and order for the community during the course of a labor controversy.

It is a basic exercise of the State's police power, designed to enjoin mass picketing, threats, violence, obstruction of public ways, and other conduct which threatens breaches of the peace and would require extraordinary police measures to control.

The decree of the State Circuit Court enforcing the order of the State Board is cast in the following terms (R. 18-19):

“It is Further Ordered, Adjudged and Decreed that the respondents United Automobile Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations—UAW-CIO, Local Union Number 833, United Automobile Aircraft and Agricultural Implement Workers of America; affiliated with the Congress of Industrial Organizations—UAW-CIO, their officers, members and agents:

“A. Immediately cease and desist from:

“1. Coercing and intimidating any person desiring to be employed by the Kohler Company in the enjoyment of his legal rights, intimidating his family, picketing his domicile, or injuring the person or property of such persons or his employe (sic).

“2. Hindering or preventing by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of lawful work or employment by any person desirous of being employed by the Kohler Company.

“3. Obstructing or interfering in any way with entrance to and egress from the premises of the Kohler Company.

“4. Obstructing or interfering with the free and uninterrupted use of public roads, streets, highways, railways or private drives leading to the premises of the Kohler Company.

"B. Take the following affirmative action:

"1. Limit the number of pickets around the Kohler Company premises to a total or (sic) not more than 200, with not more than 25 at any one entrance. Such pickets are to march single file and to, at all times, maintain a space at least 20 feet in width at each entrance to the Kohler Company premises over which pickets will not pass and on which persons either on foot or in conveyance may freely enter or leave the premises without interference."

A comparative analysis of the State decree in this case with the regulatory powers of the NLRB will demonstrate that the State statute is a police measure while Sec. 8(b)(1)(A) of the federal Act is not.

1. The State Court's decree runs against the International Union—the appellant here—the Local Union, and their officers, members and agents.

Under Sec. 8(b)(1)(A) of the National Labor Relations Act the NLRB could have issued an order against the two unions and their officers and agents. But it could not have directed an order against the members of the unions, as such. See *Perry Norvell Co.*, 80 NLRB 225 (1948);<sup>1</sup> *Sunset Line & Twine Co.*, 79 NLRB 1487 (1948); *Gammino Construction Co.*, 97 NLRB 386 (1951); *Santa Ana Lumber Co.*, 87 NLRB 937 (1949); *Irwin-Lyons Lumber Co.*, 87 NLRB 54 (1949); *Schultz Refrigerator Service*, 87 NLRB 502 (1949).

<sup>1</sup> In *Perry Norvell*, the Board said (80 NLRB at p. 245): "Section 8(b) of the amended Act designates as unfair labor practices certain acts by a labor organization or its agents. It is not directed toward such conduct by persons or employees in their individual capacity." (Italics are the Board's).



2. Paragraph A.1. of the State decree directs the various respondents to cease and desist from "... Coercing and intimidating any person desiring to be employed by the Kohler Company in the enjoyment of his legal rights, intimidating his family, picketing his domicile, or injuring the person or property of such persons or his employe."

Here there are important distinctions between the State decree and the remedy available under Sec. 8(b)(1)(A) of the NLRA.

a. The State decree prohibits interference with the enjoyment of the "legal rights" of persons desiring employment with the Company. Those "legal rights," of course, include the rights protected by Sec. 7 of the NLRA. But they include other rights also,—such as the right to seek employment by the Company, and the right to use the streets and sidewalks without threat of violence.

b. The State decree absolutely prohibits intimidation of families, domicile picketing, and injuring of persons or property without regard to coercion or restraint of employees in the exercise of their self-organizational rights. While it is plain that conduct of the type proscribed may often coerce and restrain employees in the exercise of their Sec. 7 rights, it is equally clear that there can be occasions on which it would not tend to interfere with the exercise of those rights, or, at least, where it would be extremely difficult to prove a connection between the misconduct and the exercise of a Sec. 7 right.

3. Paragraphs A.3. and A.4. of the State Court decree can be treated together. Both paragraphs are concerned solely with the use of streets, highways, and other public ways lying within the State of Wisconsin. Neither paragraph refers in any fashion to coercion or restraint of employees.

In this connection it is important to note that it was alleged by the Company in its complaint before the State Board (R. 3):

"18. That business visitors of complainant have been prevented from passing through said picket line to enter the main office of the Company unless they first visited union headquarters and obtained a 'pass' signed by a union official."

The National Labor Relations Board has no regulatory authority over the use of streets and highways lying within the State of Wisconsin. Where the streets and highways are used to coerce or restrain employees in the exercise of rights guaranteed by Sec. 7, the Board can, of course, prohibit the continuance of the restraint and coercion of employees. See, for example, *Cory Corporation*, 84 NLRB 972 (1949); *Smith Cabinet Mfg. Co.*, 81 NLRB 886 (1949). But there is no remedy provided in the National Labor Relations Act for mere blocking of streets and highways, and entrance to and egress from an employer's premises. See, *Smith Cabinet Mfg. Co.*, *supra*, at p. 888-889, where the NLRB refused to base an unfair labor practice finding upon proof that supervisors had been prevented from entering the plant because supervisors are excluded from the Act's definition of "employee."

Hence, had the NLRB found that the mass picketing here in question violated Sec. 8(b)(1)(A) of the

federal Act, it could only have directed the Unions and their agents to cease and desist from coercing or restraining *employees* in the exercise of their Sec. 7 rights. It has no power to protect the general public, including business visitors, supervisors and managerial personnel, from the coercive and intimidatory tactics revealed by this record.

The Board has itself recognized these limitations upon its powers. In *Cory Corporation, supra*, the Board said (84 NLRB 972, 977):

" . . . Legislative History supports the view that, in enacting this section [Section 8(b)(1)(A)], Congress also intended to prohibit conduct characterized by the popular term 'mass picketing.' These particular words, however, do not appear in the statute itself, and no where in the reports or debates is 'mass picketing' explicitly defined. The term must, therefore, be read in the context of Section 8(b)(1)(A), which simply says that labor organizations shall not 'restrain' or 'coerce' employees. So read, it cannot be construed as contemplating that this Board shall affirmatively regulate the number of persons who may properly picket an establishment. That is primarily a matter for the local authorities. Our function, rather, as we see it, is limited to determining whether picketing as conducted in a given situation, whether or not accompanied by violence, 'restrained' or 'coerced' employees in the exercise of their rights guaranteed under the Act, and if so, to enjoin such conduct. In these circumstances, the number of pickets has relevance only as it tends to establish the potential or calculated restraining or coercive effect of massed pickets to bar non-striking employees from entering or leaving the plant . . . "

In short, the provisions of Sec. 8(b)(1)(A) of the federal Act are intended solely as a protection of the rights guaranteed to employees by Sec. 7 of that Act; section 111.06(2)(f) of the Wisconsin Employment Peace Act, on the other hand, is a general regulation of the State's streets and highways. The relief available under the provisions of the two statutes is in no way comparable.

4. Paragraph B.1. of the State Court decree affirmatively regulates both the number of persons who may picket the Company's premises at any one time and the manner in which the picketing shall be conducted.

No more need be said here than that this is precisely the type of regulation which the NLRB held was appropriate for the states in *Cory Corporation, supra*. It is the same power as is discussed in connection with Paragraphs A.3. and 4. of the State Court decree.

Analysis of the foregoing discussion will show, we believe, that the differences between the remedy secured from the State Board and that which might have been procured from the NLRB fall into two general groups: (a) those types of relief which the NLRB cannot duplicate, and (b) those types of relief which the NLRB is empowered to grant but which are subject to restrictions under the federal Act which are not present in the State law.

Taking up first the types of relief that the NLRB could not grant,—

(1) The NLRB could not prohibit union members as such from engaging in the conduct enjoined;

(2) The NLRB could not protect any "legal rights" other than those guaranteed by Section 7 of the National Labor Relations Act;



(3) The NLRB could not prohibit obstructing or interfering with ingress to, or egress from the Company's premises as such;

(4) The NLRB could not prohibit obstructing or interfering with the free use of streets, highways, and other public ways in Wisconsin;

(5) The NLRB could not protect the rights of anyone other than "employees" to use the streets and highways and to enter and leave the Company's plant;

(6) The NLRB could not limit the number of persons who may picket the Company's premises;

(7) The NLRB could not affirmatively prescribe the manner in which the picketing should be conducted.

On the other hand, the NLRB could grant the following types of relief which the State Board has granted—but subject in each instance to the conditions noted, none of which are applicable to the State Board;

(1) The NLRB could prohibit the coercion or restraint of any "employee" of the Kohler Company in the exercise of his right to work for the Company—if it could be shown that the persons responsible for the acts of coercion and restraint were acting as agents for the union;

(2) The NLRB could prohibit the intimidation of an "employee's" family, the picketing of his domicile, and the injuring of his person or property—if it could be shown that agents of the Union had previously engaged in similar conduct, and if it could be shown that the effect of the conduct was to coerce or restrain employees in the exercise of a right guaranteed by Sec. 7 of the federal Act;

(3) The NLRB could prohibit the use of mass pickets to prevent employees from entering or leaving the Company's premises—if, again, it could be shown that the Union was responsible for the mass picketing, and if it could be shown that the mass picketing prevented employees from entering or leaving the Company plant.<sup>2</sup>

To summarize,—we believe that the foregoing discussion demonstrates plainly that the State and Federal remedies for the unlawful conduct involved in this case are substantially dissimilar. The State remedy protects the public at large against violent and coercive conduct generally. The Federal remedy protects only "employees" and protects them only to the extent that a union or its agents have interfered with the exercise of rights guaranteed by Sec. 7 of the NLRA.

We believe that these basic distinctions between the State and Federal remedies impel the conclusion that the State injunction is an exercise of the State's police power intended to preserve peace and good order against a course of conduct during the existence

<sup>2</sup> The Board has never held that mass picketing is per se coercive. "The question is whether or not it may reasonably be inferred from the manner of picketing that the conduct was calculated or tended to bar employees' 'ingress or egress.'" *H. N. Thayer Co.*, 99 NLRB 1122, 1130 (1952). Enforced, 213 F. 2d 748 (C.A. 1, 1955), cert. den. 348 U. S. 883. See also, *Cory Corporation*, 84 NLRB 972, 977 (1949); *Smith Cabinet Mfg. Co.*, 81 NLRB 886 (1949).

To illustrate the type of order which the Board normally issues in cases involving mass picketing, violence and other acts of restraint or coercion, there are printed as Appendix A to this brief the orders of the Board in some of the cases referred to herein. A comparison of those orders with that of the State Board in this case will demonstrate very plainly the difference in the scope of the regulatory powers of the two Boards.

of a labor dispute which would require extraordinary police measures to control, while the Federal remedy is intended only to effectuate the guarantee of employee rights contained in Sec. 7 of the amended National Labor Relations Act.

This is exactly the conclusion reached by the Supreme Court of Wisconsin in *Allen-Bradley Local 1111 v. Wisconsin Board*, 237 Wis. 164, 295 N. W. 791 (1941), approved by this Court in *Allen-Bradley Local 1111 v. Wisconsin Board*, 315 U. S. 740, 749 (1942), and restated by the Wisconsin Supreme Court in this case. 269 Wis. 578, 70 N. W. 2d 191.

Thus, the basic question presented in this case is whether the State of Wisconsin is divested of its police power to protect its citizens against actual and threatened breaches of the peace, by enjoining conduct which would require extraordinary police measures to control, because the injunction issued incidentally may protect employees in the enjoyment of rights guaranteed by Sec. 7 of the federal Act.

We suggest this case falls squarely within the rule, which this Court has often recognized, that an "intention of Congress to exclude States from exerting their police power must be clearly manifested." *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 611; *Kelly v. Washington*, 302 U. S. 1, 10; *Allen-Bradley Local 1111 v. Wisconsin Board*, 315 U. S. 740, 749.

As we shall now show, neither Sec. 8(b)(1)(A) of the National Labor Relations Act, or the Act as a whole, nor its legislative history, even suggests—let alone "clearly manifests"—an intention of Congress to exclude the states from exercising their police power

to preserve peace and good order in the situation presented in this case. For purposes of clarity, we divide our discussion into two parts, taking up first the power of the State to regulate activities not touched by federal regulation and second, the power of the State to duplicate the federal remedy to the extent that duplication does exist.

**II. Neither the Provisions of Sec. 8(b)(1)(A) of the National Labor Relations Act, Nor the Scheme of That Act as a Whole Suggests That Congress Intended to Oust State Regulation of Violent and Coercive Conduct Arising Out of a Labor Dispute Where the State Regulation Is Applied to Conduct Not Reached by the Federal Act**

This Court has held on occasion that a federal regulatory scheme was so complete and pervasive "as to make reasonable the inference that Congress left no room for the State to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230; *Pennsylvania v. Nelson*, U. S. 24 LW 4165, 4166, decided April 2, 1956.

Appellant's brief suggests that the course of violence and coercion which the State acted to prevent constitutes an integral and inseparable part of the labor relations between appellant and Kohler Company, and consequently cannot be divorced from the scheme which Congress has laid down in the National Labor Relations Act for the regulation of such labor relations.

But it is manifestly absurd to say that such conduct, deliberately threatening the peace and welfare of the community, may not be handled at the local level to preserve peace and order without disrupting the federal scheme for regulating labor relations between employers, employees and labor organizations. Nothing



in the federal Act indicates that Congress intended to extend its regulation over labor relations to the point where engaging in continuous violent and unlawful conduct disrupting the peace of the State may be prevented only by application of the limited power conferred upon the NLRB to prevent restraint or coercion of employees in their exercise of rights guaranteed by the Federal Act.

We have already shown that the Federal regulation of violent and coercive union conduct contained in Sec. 8(b)(1)(A) of the Amended National Labor Relations Act—far from being complete and pervasive—is notably incomplete and fragmentary. It leaves unregulated many types of violent and coercive conduct, its prohibitions apply only to the very limited class of unions and their agents, and its protection is extended only to safeguard the statutory rights of “employees”.

Moreover, the situation is not one in which it can be argued that the failure of Congress to regulate more completely evinces an intention to immunize the unregulated area from all regulation. See, *Garner v. Teamsters Union*, 346 U. S. 485, 499-500. No one would contend, we think, that Congress intended in enacting Sec. 8(b)(1)(A) to create and protect a “right” to keep supervisors, business visitors, and other non-employees out of an employer’s plant. Nor can it be said that Congress intended to create and protect a “right” in individual union members to engage in violent and coercive conduct. Even appellant has not made such a contention here.

In comparable circumstances this Court has invariably upheld State regulation even though applied in an area that is also subject to federal regulation

so long as the State regulation has reached matters not covered by the federal regulation and there has been no possibility of conflict between the two.

Thus, in *Kelly v. Washington*, 302 U. S. 1, state regulation of motor driven tugboats was upheld despite the existence of Federal statutes regulating the same subject matter. The Court's conclusion rested on the fact that the federal regulation in question was limited in scope and did not deal with the subject comprehensively.

Similarly, in *Savage v. Jones*, 225 U. S. 501, a state law requiring identification of the ingredients in foods for domestic animals was upheld even though the federal Food and Drug Act also regulated the branding of such foods transported in interstate commerce. Congress, it was held, had limited its prohibitions so as not to include that at which the state law aimed.

*South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, approved state regulation of interstate motor carriers applied in an area not covered by the Federal Motor Carrier Act. *Mintz v. Baldwin*, 289 U. S. 346, permitted a state to enforce its own animal quarantine act despite the existence of the federal Cattle Contagious Diseases Act. *Reid v. Colorado*, 187 U. S. 137, was similar to *Mintz v. Baldwin*, *supra*.

Many additional cases could be cited but the principle is summarized in *Kelly v. Washington*, *supra*. There the Court said (302 U. S. at p. 10):

"There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is

thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' "

See also, *Atchison, T. & S. F. R. Co. v. Railroad Commission*, 283 U. S. 380; *Maurer v. Hamilton*, 309 U. S. 598; *H. P. Welch Co. v. New Hampshire*, 306 U. S. 79; *Skiriotes v. Florida*, 313 U. S. 69.

The same rule has been applied in the labor field. State regulation applied to matters untouched by federal regulation has been held valid in *Allen-Bradley Local 1111 v. Wisconsin Board*, 315 U. S. 740; *International Union v. Wisconsin Board*, 336 U. S. 245. Cf. *United Construction Workers v. Laborum Construction Corp.*, 347 U. S. 656.

Thus, to the extent that Wisconsin has afforded a remedy against conduct which Sec. 8(b)(1)(A) of the federal Act does not reach, it is clear that the State's action was permissible and should be upheld.

It may, however, be argued that, despite the limited applicability of Sec. 8(b)(1)(A) of the NLRA, the Act as a whole constitutes such a detailed scheme of regulation that State action must be excluded from the entire area of labor relations. Appellant seems, in fact, to verge on this argument when it suggests that the State could not proceed against the unlawful conduct here in question in the enforcement of the State's "labor policy." (Appellant's Brief at p. 29).

The short answer to this contention is that this Court has consistently refused to find that Congress has occupied the field of labor relations to the exclusion

of the states. On the contrary, the Court has said on several occasions that,

“The National Labor Management Relations Act . . . leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting expressions of congressional will the area in which state action is still permissible.” *Garner v. Teamsters Union*, 346 U. S. 485, 488.

And see, *Weber v. Anheuser-Busch*, 348 U. S. 468, 480-481; *Algoma Plywood & Veneer Co. v. Wisconsin Board*, 336 U. S. 301, 313.

Analysis of the internal structure of the amended National Labor Relations Act points to the same result.

Sec. 10 of that Act is devoted to the mechanics for the prevention of unfair labor practices. Two subsections of Sec. 10, subsections (j) and (1), authorize the Board to seek injunctions in the United States District Courts against the continuance of unfair labor practices. These injunctions can be obtained by the Board upon the issuance of an unfair labor practice complaint and prior to a hearing or the issuance of a cease and desist order.

Subsection (j) of Sec. 10 confers on the Board discretion to seek an injunction in any case in which it believes that action is justified. Sec. 10(1), on the other hand, is mandatory. It directs the Board to seek an injunction against certain enumerated unfair labor practices. Significantly, the unfair labor practices enumerated in Subsection (1) are those set out in Secs. 8(b)(4)(A), (B), and (C) of the Act—the so-called “secondary boycott” provisions. They do not include violations of Sec. 8(b)(1).

Certainly, it is not to be lightly assumed that Con-



gress was more concerned with the elimination of secondary boycotts than with the preservation of peace and good order at the local level. On the contrary, we think the natural inference to be drawn from the failure of Congress to require the Board to seek injunctions against union violence and coercion is that Congress intended that the States should continue to be primarily responsible for the preservation of the safety of the local community.

Accordingly, we conclude that neither Sec. 8(b)(1)(A) of the federal Act nor the Act as a whole embodies such a detailed proscription of unlawful conduct by unions, their agents or members, as to preclude the enforcement of state remedies against specific unlawful conduct which is not reached by the federal regulation.

The question remains whether the State regulation may be sustained to the extent that it duplicates the remedy available under Sec. 8(b)(1)(A) of the federal Act—that is, to the extent that the State decree undertakes to protect persons who are “employees” within the meaning of Sec. 2(3) of the NLRA<sup>5</sup> from coercion or restraint by a union or its

<sup>5</sup> Sec. 2(3) of the amended federal Act provides as follows:

“The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute, or because of any unfair labor practice and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his house, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.”

agents in the exercise of rights guaranteed to "employees" by Sec. 7 of the NLRA.

We now turn to a consideration of that question.

**III. THE LEGISLATIVE HISTORY OF SEC. 8(b)(1)(A) DEMONSTRATES CONCLUSIVELY THAT CONGRESS DID NOT INTEND TO OUST STATE REGULATION OF VIOLENT AND COERCIVE UNION CONDUCT EVEN WHERE THE STATE REGULATION DUPLICATES A REMEDY MADE AVAILABLE BY THE AMENDED NATIONAL LABOR RELATIONS ACT**

At the outset we believe it is worthwhile to point out the wholly negative use which appellant makes of the legislative history of Sec. 8(b)(1)(A). Essentially appellant's argument is that this Court's prior decisions force a conclusion of federal preemption here. The legislative history is analyzed solely with a view to showing that it contains nothing absolutely irreconcilable with that conclusion. Thus, the whole basis of inquiry is shifted from a search for Congressional intent to a search for theoretical, legal symmetry.

To us, this approach reveals a fundamental weakness of appellant's case. In effect, appellant is attempting to persuade the Court that, in dealing with a problem of statutory construction, it should disregard the intent of Congress. The reason, however, for appellant's curious approach to the legislative history of Sec. 8(b)(1) is plain. As we will now show that legislative history is overwhelmingly to the effect that Congress intended to preserve state remedies with respect to union violence and coercion even where they duplicated the newly created federal remedy.

Sec. 8(b)(1) of the National Labor Relations Act, as amended, was one of the most controversial sections of the 1947 amendments to the Wagner Act. As the

Bill which ultimately became the Taft-Hartley Act was reported from the Senate Committee on Labor and Public Welfare. It contained no provision making it an unfair labor practice for a union to coerce or restrain employees in the exercise of rights guaranteed by Sec. 7. 1 Legislative History of the Labor Management Relations Act 1947, p. 441. In a statement of Supplemental Views attached to the Committee Report, however, a minority of the Committee, including Senator Taft, announced that they would seek to insert such a provision in the Bill by amendment on the Senate floor. Id. at p. 456. Summarizing their reasons for offering such an amendment, the Committee Minority stated (Id. at p. 456):

"The Committee heard many instances of union coercion of employees and their families in the course of organizing campaigns; also direct interference and other violence. Some of these acts are illegal under state law, but we see no reason why they should not also constitute unfair labor practices to be investigated by the National Labor Relations Board and at least deprive the violators of any protection furnished by the Wagner Act

When the Bill (S. 1126) reached the floor, the proposed amendment was offered by Senator Ball of Minnesota for himself and Senators Byrd, George and Smith of New Jersey. 2 Legislative History of the Labor Management Relations Act of 1947, p. 1018. It provoked a prolonged debate in which the principal participants were Senators Ball and Taft in support of the amendment, and Senators Morse, Ives and Pepper in opposition.

During the course of this debate most of the principal participants on both sides indicated plainly that

the amendment was not intended to oust the states of jurisdiction over violent and coercive conduct. The amendment was viewed by all concerned as affording an alternative or supplementary remedy to any remedy already available under state law.

Thus, Senator Taft, in an exchange with Senator Pepper, made the following statement (Id. at p. 1031):

"... There are plenty of methods of coercion short of actual physical violence. So that in this section there is no duplication whatever. But suppose there is duplication in extreme cases; suppose there is a threat of violence constituting violation of the law of the state. Why should it not be an unfair labor practice? It is on the part of the employer. If an employer proceeds to use violence, as employers once did, if they use the kind of goon-squad tactics labor unions are permitted to use—and they once did—if they threaten men with physical violence if they join a union, they are subject to be proceeded against for violating the National Labor Relations Act. There is no reason in the world why there should not be two remedies for an act of that kind."

At a later date, Senator Ball, addressing himself to the question of the need for the amendment, made the following remarks (Id. at p. 1220):

"It is no wonder that local communities and their peace officers have been reluctant to vigorously enforce law when they saw the Federal Government was holding the unions exempt from any kind of Federal regulation. The only laws we have had restrain employers and not unions. So it may well be that many of the types of activities of unions which we are seeking to restrain somewhat by this mild amendment are the kind of activities which would be corrected by good local



law enforcement. But I think we shall encourage that kind of law enforcement if the Federal Government, acting through Congress, states clearly its position that individual employees are entitled to their right of self-organization free from coercion from any source, whether it be the employer, the union, or some outside source."

Opposing the Ball amendment, Senator Ives showed that he also understood that it would not affect existing state laws. The Senator said (*Id.* at p. 1021):

"Moreover, assuming that these proscribed acts involved violence and physical coercion, the provision is unnecessary because offenses of this type are punishable under state and local police law. In fact, the enactment of this provision would make unions and their agents liable twice for the same offense, once under state and once under Federal law. Employers run no such risk for interfering with their employees' rights."

With this statement Senator Morse expressed his agreement. *Id.* at p. 1196.

Senator Murray, one of the leaders of the opposition to the Taft-Hartley Act in the Senate,—though not a principal participant in the debate on the Ball amendment—had the same understanding of the effect of that amendment. Senator Murray inserted in the record a written analysis of the whole Bill, which included the following comment respecting the proposed Sec. 8(b)(1) (*Id.* at p. 1578):

"Comment: The proposal contained in Sec. 8 (b)(1) making it an unfair labor practice on the part of the unions and their agents to restrain or coerce employees in the exercise of rights guaranteed in Sec. 7 would lead to protracted litigation,

because of the difficulty in determining who are agents of a labor organization and what constitutes restraint and coercion within its meaning. Moreover, assuming that these proscribed acts involve violence and physical coercion, the provision is unnecessary because offenses of this type are punishable under state and local police laws. In fact, the enactment of this provision would make unions and their agents liable twice for the same offense, once under state and once under Federal law. Employers run no such double risk for interfering with their employees' rights ..."

Probably the clearest statement of the Congressional purpose to preserve and supplement existing state remedies against mass picketing and other types of union coercive tactics was made by Senator Ball in a running discussion with Senator Ives. In the course of that discussion the following occurred (Id. at p. 1202):

"Mr. Ives. Is it the Senator's idea that machinery would be established under the control of the National Labor Relations Board to stop mass picketing?

"Mr. Ball. No, of course not.

"Mr. Ives. The Senator's idea is to have the police power of the Federal Government exercised?

"Mr. Ball. No. But I think that a mass picket line would be an unfair labor practice. We would not stop it, of course. The Senator knows that the process of filing an unfair labor practice charge and getting a hearing before the board would be a completely impractical way of dealing with a mass picket line. It might perhaps restrain unions in the use of the particular weapon, and I think that would be all to the good. It might discourage them a little, because it would be an unfair labor practice.

"Mr. Ives. They would be accused of an unfair labor practice, would they?"

"Mr. Ball. Yes."

That the state law remedies that the Senators had in mind were not merely criminal penalties as appellant contends, was made clear in an exchange between Senators Morse and Taft (Id. at p. 1208):

"Mr. Morse. . . . I am of the opinion that experience will prove that even before a hearing, the filing of the petition itself, with certain allegations, will cause judges in some sections of the country at that point to interpret the law in such a way that it will serve as the foundation or bottom for an injunction.

"Mr. Taft. I agree with the Senator that if a case is filed alleging that the union threatens a man personally, or sends threatening letters to him, saying it is going to beat him and his family if he does not join the union, and the Board then finds that that was done, and issues a cease-and-desist order, it may be it would encourage a district attorney, or some of the local courts, to take unwarranted action. But in such a case the union ought to be punished. An injunction ought to be issued to prevent such a procedure.

"The Senator from Oregon a while ago said that the enactment of this proposed legislation will result in duplication of some of the state laws. It will duplicate some of the state laws only to the extent as I see it that actual violence is involved in the threat or in the operation.

"Mr. Morse: I believe with the Senator that that sort of action should be stopped. It should be stopped through state laws and not through a Federal law. The point I am seeking to make is that with this amendment on the statute books I think

it will be found that the very filing of the allegations will cause courts to proceed to issue injunctions. That is why I say I think it will be a tremendous handicap to legitimate strikes and legitimate organizational activities.

"Mr. Taft. The bill does not in any way change the right of the Federal court to issue an injunction. The Senator is suggesting that the enactment of this proposed legislation will bring about a condition which will compel the local court to do its duty. If that will be the result, I believe it will be a beneficial effect."

Summarizing this legislative history, it is fair to say, we believe, that it shows two things; first, that Congress intended merely to supplement existing state remedies against union violence and coercion, and to encourage their more vigorous enforcement; and second, that Congress recognized that the federal remedy incorporated into Sec. 8(b)(1) could not be expected to be effective against a particular episode of mass picketing. The primary purpose in adopting the federal remedy was to discourage future incidents of mass picketing by subjecting the Union to a cease and desist order.

Moreover, the legislative history is clear that Congress expressly foresaw that the States might elect to deal with mass picketing and other types of union violence and coercion by the use of the injunction. Indeed, even in the absence of this legislative history, such an expectation should be attributed to the Congress. For it seems apparent that criminal prosecution of what might be thousands of mass picketers is scarcely a practical remedy.



In Wisconsin it happens that the State provides a remedy combining the administrative process and the equitable powers of the State courts. We can admit that this remedy is not as efficient and speedy as direct application to the Courts for an injunction would be. But surely it cannot be argued that Congress intended to oust the states of power to afford a cumbersome remedy. Nor can appellant establish any perceptible right to insist that it should be proceeded against in only the most effective fashion.

We come then to the conclusion that in enacting Sec. 8(b)(1)(A) of the amended federal Act Congress intended merely to augment existing state remedies. While Congress unquestionably intended to preserve the right of the states to proceed against violence and coercion by criminal prosecution, it foresaw that the states would also utilize the injunctive process against union conduct of this type. Congress expressly encouraged the vigorous enforcement of these state remedies.

In this context it cannot be seriously contended that Wisconsin has somehow forfeited its power to regulate the conduct in question by adopting a remedy which postpones the exercise of the State's injunctive powers until an administrative proceeding has first demonstrated the need for injunctive relief. On the contrary, the admitted power of the State to furnish a more drastic remedy would seem to carry with it the power to furnish the less drastic one involved in this case.

**IV. SINCE THE STATE AND FEDERAL REGULATION OF VIOLENT AND COERCIVE CONDUCT OCCURRING IN THE COURSE OF A LABOR DISPUTE IS APPLIED IN THE ENFORCEMENT OF DIFFERENT POLICIES AND REACHES THE CONDUCT UNDER DIFFERENT ASPECTS, BOTH MAY STAND DESPITE SOME DUPLICATION**

Appellant takes the position that the legislative history of Sec. 8(b)(1)(A) shows only that Congress intended to preserve State criminal laws relating to violence and coercion. It argues that the legislative history "does not support the continued validity of state labor relations procedures entailing, as they would, a *third* remedy for the same conduct," (Appellant's Brief at p. 35). Thus, it rationalizes its contention, based primarily on *Garner v. Teamsters Union*, 346 U. S. 485, and *Weber v. Anheuser-Busch*, 348 U. S. 648, that the enactment of Sec. 8(b)(1)(A) of the amended federal Act has deprived the state of the power to proceed against union violence and coercion in the enforcement of the State's labor policy. (Appellant's Brief at p. 29).

While we believe that the legislative history is overwhelmingly against appellant on this question, we think it is worthwhile to point out that appellant's conclusion would be erroneous even if it did derive some support from the legislative history.

As we have previously noted, Wisconsin's regulation of the violent and coercive conduct here involved has been applied in the exercise of the State's power to protect the health, welfare and safety of its citizens against disorders arising out of labor disputes. The specific provisions of the Wisconsin Employment Peace Act applied by the State in this case have been so construed by the Wisconsin Supreme Court. *Allen-Bradley Local 1111 v. Wisconsin Board*, 237 Wis. 164,

295 N. W. 791 (1941); *United Automobile Workers, CIO v. Wisconsin Board*, 269 Wis. 578; 70 N. W. 2d 191 (1955). This authoritative construction of state law is, of course, controlling on this Court.

Sec. 8(b)(1)(A) of the National Labor Relations Act, on the other hand, reaches the Union's conduct solely as a means of enforcing the guarantee of employee rights contained in Sec. 7 of that Act.

Thus, the State is proceeding against the conduct as an actual or threatened breach of the peace while the Federal Government treats it as an invasion of federally protected rights.

This Court has often recognized that the same act may offend against different state and federal policies. And where this has been the case it has permitted both the state and the federal prohibition to be applied. As was said by Mr. Justice Frankfurter, dissenting, in *California v. Zook*, 336 U. S. 725, 740:

"Of course the same physical act may offend a State policy and another policy of the United States. Assaulting a United States Marshal would offend a State's policy against street brawls, but it may also be an obstruction to the administration of federal law. Scores of such instances, inevitable in a federal government, will readily suggest themselves. That was the kind of a situation presented by *United States v. Marigold*, 9 How (US) 560, 13 L. Ed. 257. Passing counterfeit currency may, in one aspect, be 'a private cheat practiced by one citizen of Ohio upon another,' and therefore invoke a State's concern in 'protecting her citizens against frauds,' 9 How (US) 568, 569, but the same passing becomes of vital concern to the Federal Government because it tends to debase the currency."

This principle is, we believe, recognized in *Rice v. Board of Trade*, 331 U. S. 247. There, regulatory authority of the Illinois Commerce Commission to review rules adopted by the Chicago Board of Trade was upheld despite the fact that the Board of Trade's rules were also subject to review by the Secretary of Agriculture acting pursuant to the federal Commodity Exchange Act. Disposing of the argument that there was potential conflict in the dual regulation, the Court said (331 U. S. at pp. 255-256):

"Hence it seems to us that no action of the Illinois Commission within the zone where the Board has freedom to act would contravene the federal scheme of regulation. It would be quite a different matter if the Illinois Commission adopted rules for the Board which either violated the standards of the Act or collided with rules of the Secretary. But such collision is not necessary; and we cannot assume that the Illinois Commission will take any action which in any way impairs the federal regulatory scheme."

More directly in point is *Union Brokerage Co. v. Jensen*, 322 U. S. 202, where the Minnesota Foreign Corporation Act was sustained against a claim of federal preemption. In *Union Brokerage* it appeared that the United States Treasury Department, acting pursuant to an Act of Congress, had issued detailed regulations governing the entry into, and the conduct of, the customhouse brokerage business. Union had qualified as a broker under these regulations to do business in a District which included the State of Minnesota; it had not, however, qualified to do business in Minnesota under the State's Foreign Corporation Act. Pursuant to the provisions of the Foreign Corporation Act the State Courts had refused to entertain a



suit brought by Union solely on the ground of Union's failure to qualify as required by the state law. Before this Court it was urged that the Treasury Department regulations and the Act of Congress pursuant to which they were promulgated precluded the enforcement of the State's Foreign Corporation Act against Union.

In rejecting that contention the Court said (322 U. S., at p. 207):

"... the limited and defined control which federal authority has thus far seen fit to assert over customhouse brokers does not deny to Minnesota the power to subject Union to the same demand which it makes of all other foreign corporations seeking the facilities of Minnesota's courts. The federal requirements and this state requirement can move freely within the orbits of their respective purposes without impinging upon one another. The federal regulations are concerned solely with the relations of the customhouse broker to the United States and to the importer and exporter. The limited federal supervision of the financial activities of Union is restricted to these federal interests. Such supervision does not touch the interest of the state in the protection of those who have other dealings with Union, and therefore does not preempt appropriate means for their protection.

"In a situation like the present, where an enterprise touches different and not common interests between Nation and State, our task is that of harmonizing these interests without sacrificing either."

Here, as in *Union Brokerage*, the violent and coercive activity in which the unions and their members engaged, touched "different and not common" interests of the State and the federal government,—the

State's interest in the preservation of peace and good order and the prevention of street brawls, and the federal government's interest in the effectuation of the guarantee of employee rights contained in Sec. 7 of the National Labor Relations Act. Under the rule of *Union Brokerage*, these dual interests should be harmonized without sacrificing either. And, at least in this case, the task of harmonizing these interests presents no serious problem for it is not even argued that the state regulation conflicts with the federal regulatory scheme.

*California v. Zook*, 336 U. S. 725, was a far less persuasive case for the preservation of dual regulation than the case at bar. Yet there, California's regulation of the transportation of passengers by motor vehicle was upheld despite the existence of the almost identical provisions of the federal Motor Carrier Act. The Court concluded that (336 U. S. at pp. 737-738):

"The state and federal regulations here applicable have their separate spheres of operation." *Union Brokerage Co. v. Jensen*, *supra*, 322 U. S. at 208, 88 L. Ed. 1232, 64 S. Ct. 967, 152 ALR 1072. So far as casual, occasional, or reciprocal transportation of passengers for hire is concerned, the State may punish as it has in the present case for the safety and welfare of its inhabitants; the nation may punish for the safety and welfare of interstate commerce. There is no conflict."

Thus, in *Zook* both the state and the federal regulation were directed essentially at safety matters, while in the instant case the state and federal regulations reach the conduct in question under entirely different aspects. *A fortiori* the state regulation should be upheld in this case.

See, also, *Federal Compress & W. Co. v. McLean*, 291 U. S. 17.

Additional analogies can, of course, be drawn from criminal law. See, for example, *United States v. Marigold*, 9 How. (U.S.) 560; *United States v. Lanza*, 260 U. S. 377; *Hebert v. Louisiana*, 272 U. S. 312. Cf. *Southern R. Co. v. Railroad Commission*, 236 U. S. 439; *Jerome v. United States*, 318 U. S. 101.

We recognize that in *Weber v. Anheuser-Busch*, 348 U. S. 468, 479-480, this Court rejected an argument that state regulation should be upheld because applied in enforcement of the state's restraint of trade, rather than labor, policy. But the Court went on to point out that "... this case is not clearly one of 'unfair labor practices.'" In the instant case, while the unfair labor practices are not entirely clear because of the necessity of establishing union agency to show a violation of Sec. 8(b)(1)(A) of the NLRA, it is perfectly clear that the conduct is either unprotected by the federal Act, *Allen-Bradley Local 1111 v. Wisconsin Board*, 315 U. S. 740, or is prohibited by it. Thus, none of the delicate questions concerning protected activity which were noted in the *Weber* case are present here.<sup>6</sup>

Moreover, the fact that it was a restraint of trade policy that the State sought to enforce in *Weber* seems to us to have significance. In many respects, all trade union conduct can be related to the general field of restraint of trade. Thus, a holding that the states could enforce their restraint of trade policies

<sup>6</sup> We discuss this distinction further in our general treatment of *Weber v. Anheuser-Busch* and *Garner v. Teamsters Union*, 346 U. S. 485, *infra*, at pp. 40 to 43.

against labor union activity would have permitted the states effectively to nullify the rights assured to employees and their unions by the national labor policy.

Enforcement of a state's policy against breaches of the peace poses no such threat to the national policy. By its very nature such a state policy can have only limited applicability to the labor field, and its enforcement cannot result in the denial of rights assured by the federal government.

Accordingly, since the state and federal governments have touched the violent and coercive conduct here involved under different aspects, the dual regulation is permissible and the state's action should be sustained.

**V. THE GARNER & WEBER DECISIONS DO NOT SUSTAIN APPELLANT'S CLAIM OF FEDERAL PREEMPTION IN THIS CASE**

At the outset it should be noted that even appellant necessarily concedes that there has been no substantive preemption by Congress of the area of violent and coercive union conduct. The legislative history of Sec. 8(b)(1) of the amended National Labor Relations Act plainly makes such a concession unavoidable.<sup>7</sup> Appellant is thus driven back to a second line of defense. It maintains that Congress has "pre-empted" the remedial technique of dealing with such conduct by classifying it as an unfair labor practice and vesting jurisdiction over it in an administrative agency. To support this proposition appellant relies principally upon this Court's decisions in *Garner v. Teamsters Union*, 346 U. S. 485 and *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468.

<sup>7</sup> The Legislative History is discussed, *supra*, at pp. 26 to 33.



There are, however, at least two obvious and important distinctions between those two cases and the one at bar; a) *Gargier* and *Anheuser-Busch* both involved union conduct over which Congress had exerted substantive preemption, and b) *Gärner* and *Anheuser-Busch* both involved peaceful union conduct—not the violent and coercive tactics present in this case. Thus, though both cases on which appellant relies reach the conclusion that the remedy provided in the federal act is exclusive, neither can be said to stand for the principle for which appellant cites it,—namely, that the states may not afford a remedy paralleling a federal remedy with respect to non-peaceful conduct over which Congress has not exerted substantive preemption.

Moreover, it seems to us that there is a vast difference between exclusion of concurrent state regulation of peaceful union conduct in a labor dispute and exclusion of state regulation of violent conduct in similar circumstances.

Where a union takes peaceful,—though unlawful—economic action against an employer and his customers or suppliers, no immediate threat arises to the welfare of the community at large. The legislative judgment outlawing peaceful conduct of this type rests, not on the need for protecting the general community, but rather on the conclusion that it is desirable to confine the effect of a labor dispute to the immediate parties in interest—the primary employer and his employees. In such a case, it is reasonable to impute to the Congress a desire for uniformity in construction and administration of its legislation particularly in view of the care Congress has taken to insure that its remedy is prompt and effective by enacting Sec. 10(1)

of the Act—the so-called “mandatory injunction” provision.

Where, however, the unlawful union conduct involves mass violence and coercion an entirely different situation is presented. Conduct of this type does pose an immediate and serious threat to the entire community in which it occurs. It affects not only the participants to the dispute and those who have business relationships with them but literally every member of the community at large—no matter how remote from the economic area of the contest. In a word, there is precipitated a state of anarchy within the community.

In such circumstances we submit that it is unreasonable to impute to the Congress an intent to eliminate *any* remedy which offers some hope of restoring public peace and good order.

Here, at least, it would seem, Congress would be more concerned with the speed and effectiveness of the remedy than with the preservation of the technical niceties to be obtained through centralized construction and administration of the Act.

In this connection, it is essential to recognize also that many of the difficult technical problems inherent in cases involving allegedly unlawful, but peaceful, union conduct are not presented when the union is charged with violent and coercive conduct. Typically, in secondary boycott and jurisdictional strike situations involving only peaceful picketing the union defends not only on the ground that its conduct, if unlawful, falls within the exclusive regulatory power of the National Labor Relations Board but also on the affirmative ground that the conduct is protected by Sec. 7 of the amended federal act. See, for example,

Brief for the Petitioners in *Weber v. Anheuser-Busch* at p. 20 and *passim*; Brief for Respondents in *Garner v. Teamsters Union*, at p. 11 and *passim*. Often the dividing line between protected and unlawful conduct in such cases is far from clear, as this Court noted in *Weber v. Anheuser-Busch*, *supra*, 348 U. S. at p. 481. Hence, state intrusion into this area could very possibly be productive of conflict and confusion.

But these problems do not arise in cases involving violent and coercive union conduct, for normally in such cases it cannot be, and is not, contended that the conduct is protected—as an examination of appellant's brief in this case reveals. For this reason, it is fair to say, we believe, that insistence on exclusive federal jurisdiction in a case of this type is, in reality, no more than an attempt to defeat or delay substantial justice. In effect, appellant is contending for no more than the right to be enjoined by the federal, rather than a state, government. The only practical benefit that appellant can hope to achieve is the right to carry on its unlawful and terroristic conduct while the cumbersome processes of the NLRB are put into motion. We submit that, absent an overwhelming showing to the contrary, this Court should not impute to the Congress an intent to grant what would amount to a revocable license to terrorize a community,—an intent to “protect” mass violence and coercion until such time as the NLRB can conclude that the conduct is prohibited.

VI. THIS COURT, THE NATIONAL LABOR RELATIONS BOARD, AND VARIOUS STATE COURTS HAVE REPEATEDLY AFFIRMED THE POWER OF THE STATES TO REGULATE VIOLENT AND COERCIVE UNION CONDUCT SINCE THE ENACTMENT OF THE TAFT-HARTLEY ACT

Appellant admits that this case is almost identical factually with *Allen-Bradley Local 1111 v. Wisconsin Board*, 315 U. S. 740, but attempts to distinguish *Allen-Bradley* on the ground that it was decided prior to the enactment of the Taft-Hartley Act.

We will not labor the fact that this Court has, on numerous occasions since the enactment of Taft-Hartley, cited *Allen-Bradley* for the proposition that the states still retain the right to regulate violent and coercive union conduct. See, for example, *Garner v. Teamsters Union*, 346 U. S. 485, 488; *International Union v. Wisconsin Board*, 336 U. S. 245, 253; *International Union v. O'Brien*, 339 U. S. 454, 459; *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 482. And see, *National Labor Relations Board v. International Rice Milling Co.*, 341 U. S. 665, 672, where the same principle is recognized without citation of *Allen-Bradley*.

We do, however, attribute special significance to the fact that in *Allen-Bradley* the violent and coercive union conduct had been reached through precisely the same administrative and judicial remedy as was invoked in this case. Thus, we read this Court's various approving references to *Allen-Bradley* since the enactment of the Taft-Hartley Act, not only as a recognition of the power of the states to deal with conduct of the type involved in the case at bar, but also as an express approval of the procedure followed in this case.

Moreover, the National Labor Relations Board has itself recognized the continuing authority of the States to regulate violent and coercive action arising out of a



labor dispute. Thus, in the brief submitted to this court by the NLRB as *amicus curiae* in *Weber v. Anheuser-Busch*, *supra*, the Board said (Brief at p. 14):

"On the other hand, as this Court has pointed out, the text and history of the federal Act plainly contemplate certain areas subject to federal control in which the states are nonetheless free to act. Clearly within this category is the regulation of controversies or relationships which Congress has neither considered nor sought to regulate, but has left ungoverned. Thus, this Court held in *Auto Workers v. Wisconsin Board*, 336 U. S. 245, 264-265, that Wisconsin ~~could~~ regulate the conduct there involved because

'recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by federal statute nor was it legalized and approved thereby. Such being the case, the state police power was not superseded by congressional Act over a subject normally within its exclusive power and reachable by federal regulation only because of its effects on that interstate commerce which Congress may regulate.'<sup>8</sup>

<sup>88</sup> This Court found additional support for its holding in the proposition that the federal Act empowered the Board to forbid a strike because its 'purpose' was illegal, but not because its 'method' was illegal (at pp. 253, 263). However, it may be noted that Section 8(b) (1) of the Act does empower the Board to forbid strike activity by labor organizations which restrain or coerces employees in the exercise of the rights guaranteed by Section 7 of the Act. See, for example, *International Rice Milling Co., Inc. v. National Labor Relations Board*, 341 U. S. 665, 672, n. 5; *United Construction Workers v. Laburnum Corp.*, 347 U. S. 656, 668-669; *National Labor Relations Board v. United Mine Workers*, 202 F. 2d 177 (C. A. 3), and cases cited; *National Maritime Union of America*, 78 NLRB 971, 982-986."

"Moreover, even in those areas where Congress has asserted its paramount authority, Congress has made it clear that in certain instances the states may act—for example, with respect to breaches of the peace (*Allen-Bradley Local v. Wisconsin Board*, 315 U. S. 740, or with respect to violations of state restrictions on 'union-security arrangements more rigid than those contained in the federal Act (*Algoma Plywood & Veneer Co. v. Wisconsin Board*, 336 U. S. 301), or where similarity of statute and interpretation would enable the National Board to cede jurisdiction to a state agency (Section 10(a) of the Act).

"The most recent pronouncement of this Court in the field of federal-state jurisdiction over labor controversies is *United Construction Workers v. Laburnum Corp.*, 347 U. S. 656. The nub of this decision is that the state may act where the essence of its action is not the regulation of labor relations matters which fall within the Congressional purview, but merely the protection of a legitimate state interest. *Laburnum*, however, in no way alters the principle established in *Garner* six months earlier, that a state may not 'impinge on the area of labor combat' which the federal authority 'designed to be free' (346 U. S., at 500). *Laburnum* held merely that the federal Act does not bar a state court from awarding damages in tort for violent activities of a labor organization which, although they constituted unfair labor practices under the federal Act, are also a common law tort. Support for this conclusion was found in the familiar principle that the Congressional intent in this regard was controlling. The Court stressed the legislative history of Section 8(b)

(1) (A) of the Act to the effect that federal regulation of violence in labor disputes should not preclude concurrent exercise of local police power over such violence merely because it occurred in a context of labor relations affecting interstate commerce (at pp. 668-669). Cf. *Allen-Bradley Local v. Wisconsin Board*, *supra*."

The Board's position was even more clearly expressed by then Chairman Herzog appearing before the Senate Committee on Labor and Public Welfare at the time of the 1953 hearings on proposed revisions of the Taft-Hartley Act. Mr. Herzog made the following statement (Hearings before Senate Committee on Labor and Public Welfare, 83d Cong., 1st Sess., Part 4, pp. 2123-2124):

"There are, of course, aspects of labor controversies which the States have traditionally been free to control. Although earlier witnesses have apparently sought to convey a contrary impression, the Labor-Management Relations Act of 1947 has not cut into that freedom. We speak of the inherent police power of each sovereign State to deal with acts of violence or other threats to the peace. The Supreme Court has emphasized this principle and recognized its continuing validity since the present Federal act, with its section 8 (b) (1) (A), went into effect. Approving certain action of the State of Wisconsin and rejecting the contention that the Federal statute superseded State authority, the Supreme Court said, in 1949: <sup>18</sup> 'while the Federal Board is empowered

<sup>18</sup> *UAW (AFL) v. Wisconsin Employment Relations Board* (336 U. S. 245, 253). A convenient compilation of the cases on this general subject appears in the recent staff report of a subcommittee of this committee, entitled 'State Labor Injunction and Federal Law' (82d Cong., 2d sess.)."

to forbid a strike, when and because its purpose is one that the Federal act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the States.

“This is the law; no other decision of the Supreme Court has cast any doubt upon it. If some nevertheless believe it desirable for the Congress to underscore this principle by express enactment, we suggest that it can be done in more circumscribed and more specific terms than appear in S. 1161.”

Significantly, as Chairman Herzog's statement shows, there was pending before the Senate Committee as of the time of the Chairman's statement, a bill (S. 1161) which would have conferred upon the States broad regulatory authority over all strikes and picketing. Thus the failure of the Congress to enact legislation partly at least on the strength of the statement of the Chairman of the NLRB indicates that Congress approved the Board's construction of the scope of State powers. See, *Alstate Construction Co. v. Durkin*, 345 U. S. 13, 17. It should be added that only recently the Board has stated that former Chairman Herzog's statement “continues to represent the Board's present views”. See memorandum filed by the Solicitor General of The United States in *United Construction Workers v. Laburnum Construction Corp.*, *supra*.

Moreover, State courts have uniformly concluded that the States still retain the power to regulate violent and coercive action such as is here in issue. See,



for example, *Tallman Co. v. Latal*, 284 S. W. 2d 547, Mo. (Supreme Court Mo., En Banc, 1955); *Williams v. Cedartown Textiles*, 68 S. E. 2d 705, 208 Ga. 659 (Ga. Supreme Court, 1952); *Perez v. Trifiletti*, 74 So. 2d 100, (Fla. Supreme Court, 1954) Certiorari denied, 348 U. S. 926; *Douglas Public Service Corp. v. Gaspard*, 74 So. 2d 182, 225 La. 972 (La. Supreme Court, 1954); *McQuay v. United Automobile Workers, CIO*, 72 N. W. 2d 81, ..... Minn. .... (Minn. Supreme Court, 1955) appeal filed, December 12, 1955, sub nom. *United Automobile Workers, CIO v. Anderson*, No. 565.

To us, the various statements of this court previously referred to, the briefs of the NLRB and the decisions of the State courts which we have cited, constitute an impressive body of judicial approval of State regulation of the type of conduct here in question. We have previously noted that this court has often said that the exercise by the States of their police powers will not be precluded unless the intention of Congress to reach that result has been clearly manifested. Now that the Taft-Hartley Act has been in effect for eight years and after numerous judicial interpretations which preserve State regulation of violent and coercive conduct, this appellant for the first time contends that the intention of Congress to exclude the States from this area has been clearly manifested. We submit, on the contrary, that had such an intention been present, it would have been discerned long ere this. The fact that such an intention has not been previously discovered is, we believe, convincing proof that no such intention in fact exists.

VII. SINCE THE STATES HAVE THE POWER TO REGULATE VIOLENT AND COERCIVE UNION CONDUCT THEY ARE FREE TO EMPLOY WHATEVER MEANS THEY SEE FIT TO MAKE THEIR REGULATION EFFECTIVE

We believe that this Court's decisions in *Algoma Plywood & Veneer Co. v. Wisconsin Board*, 336 U. S. 301, and *International Union v. Wisconsin Board*, 336 U. S. 245, (the "Briggs-Stratton" case), are dispositive of appellant's claim that the states may not proceed against violent and coercive union conduct as an "unfair labor practice."

In *Algoma* the State had held that the employer's discharge of an employee for failure to secure and maintain union membership under a union shop contract was an unfair labor practice under state law because the union shop had not been authorized by a vote among the members of the bargaining unit as the State law required. Before this Court it was urged by the employer that Sec. 10(a) of the Wagner Act, which made exclusive the power of the National Labor Relations Board to prevent the commission of unfair labor practices in interstate commerce, deprived the states of power to proceed against employers subject to the federal Act for the commission of acts declared to be unfair labor practices by state law. That argument was rejected by the Court in the following language (336 U. S. at p. 305):

"The term 'unfair labor practice' is not a term of art having an independent significance which transcends its statutory definition. The States are free (apart from preemption by Congress) to characterize any wrong of any kind by an employer to an employee, whether statutorily created or known to the common law, as an 'unfair labor practice.'"

Similarly, in the *Briggs-Stratton* case the state law made the intermittent, unannounced, temporary work stoppages there involved an unfair labor practice. Again this Court upheld the right of the state to proceed in this fashion against that type of union conduct.

We recognize that there is a distinction between the instant case and *Algoma* and *Briggs-Stratton*, for in both the earlier cases the conduct involved was wholly unregulated by the federal Act while here a part of the conduct is expressly prohibited by that Act.

But for present purposes this is a distinction without a difference. *Algoma* and *Briggs-Stratton* both confirm the power of the states to proceed against unlawful conduct in the labor field as an "unfair labor practice" so long as the conduct in question is subject to state regulation.

**VIII. THE FACTS OF THIS CASE DEMONSTRATE THE NEED FOR THE PRESERVATION OF BOTH STATE AND FEDERAL REMEDIES AGAINST VIOLENT AND COERCIVE CONDUCT**

In its brief appellant makes extensive reference to an unfair labor practice proceeding currently being conducted before the National Labor Relations Board in which this appellee is the respondent. The references are intended to show that there may be a conflict between state and federal regulation both applied to the union conduct involved in this case.

We have noted, in our motion to dismiss, our objection to these references by appellant to matters that are not of record in this Court. (No part of the record before the National Labor Relations Board is included in the record here.) We now renew our objection to this practice. Appellant attempts to defend its conduct on the ground that (Appellant's Brief, p. 44, Footnote 15), "... the NLRB record is a public one

of which, we believe, we may properly advise this Court." No authority is cited by appellant for this novel proposition and we are aware of no rule which permits a Court to take judicial notice of the record in a case currently pending before another tribunal.

We submit that all references to matters dehors the record should be disregarded by this Court.

In any event, however, we disagree strongly with the conclusion that appellant reaches in regard to the possibility of state-federal conflict in this case.

We believe that the facts here demonstrate conclusively the need for preservation of both state and federal remedies lest a remedial hiatus develop which would leave both sovereigns helpless in the face of unlawful conduct which both condemn.

We have pointed out previously the inadequacies of the federal remedy and the fact that Congress expressly recognized certain of these inadequacies. Yet appellant would have state action stayed completely because some of the conduct involved *might* violate the federal Act.

Thus, the practical result of appellant's argument would be to deny to an employer—faced, as was this appellee, with a course of conduct which is plainly contrary to both state and federal policy—access to a single agency which has the power to prohibit all of the unlawful conduct in question. If appellant's argument should be accepted, an employer so situated would be required to proceed initially by filing charges with the National Labor Relations Board. Presumably, that Board would then hold a hearing and determine which of the various acts of misconduct charged constituted violations of Sec. 8(b)(1)(A) of the Na-



tional Labor Relations Act. Of course, no matter what determination the NLRB should make; the federal remedy could not be complete because the Federal Board is without power to protect anyone other than employees, and it can only protect them from restraint or coercion by unions and their agents.

But the fact that the federal remedy is necessarily inadequate could not avail to confer jurisdiction on the states. For there is no conceivable way in which the states can act in a case of this sort without incidentally protecting the rights assured to employees by Sec. 7 of the NLRA and simultaneously prohibiting conduct which may violate Sec. 8(b)(1)(A) of the federal Act.

To illustrate, the states could not prohibit mass picketing and the blocking of ingress to and egress from an employer's plant because an incidental but inevitable effect of such an order would be to protect the right of employees to enter and leave their place of employment—a right guaranteed by Sec. 7 of the NLRA.

Similarly, the states could not prohibit obstruction of streets and highways because obstruction of streets and highways might involve coercion of employees in the exercise of their federally protected rights. Nor could the states prohibit violence and coercion on the part of union members, for the union members *might* be acting as agents for the union.

Additional examples could be given, but enough has been said, we believe, to demonstrate that state action would be effectively paralyzed at least until proceedings before the NLRB had established the area of federal regulation and, inferentially, the area in which the state could act.

Hence, if appellant's argument is accepted the states would be prevented from acting to preserve law and order until the NLRB has determined the precise area in which state action is permissible,—and this despite the fact that the federal remedy which the NLRB is authorized to provide is plainly inadequate.

We can conceive of no circumstance which would more speedily bring the administration of justice into disrepute and hold the authority of government up to ridicule than this practical inability to cope with mass lawlessness.

We have noted at the outset of our brief the fact that the power and duty to preserve the peace is perhaps the most fundamental of the incidents of sovereignty. When that power is gone, sovereignty itself disappears. For the sovereign who cannot preserve the peace is palpably incapable of assuring those other rights of citizenship which necessarily assume for their recognition the pre-existence of an orderly society. Yet it is precisely this power which appellant would deny to the State of Wisconsin.

To us it is unthinkable that there should be attributed to the Congress that enacted the Taft-Hartley Act an intent to strike so severe a blow at the very foundations of state government. Surely such an intent, had it existed, would have been reflected clearly and fully in both the legislation itself and its history. Absent all evidence of such an intent, a construction of the Taft-Hartley Act effecting such a startling and momentous redistribution of state and federal powers should be avoided. See, *Palmer v. Massachusetts*, 308 U. S. 79, 85; *Allen-Bradley Local 1111 v. Wisconsin Board*, 315 U. S. 740; *Kelly v. Washington*, 302 U. S. 1, 10.

**CONCLUSION**

For the reasons stated the judgment of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

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**APPENDIX OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD IN TYPICAL CASES INVOLVING MASS VIOLENCE AND COERCION BY UNIONS AND THEIR AGENTS**

**Order in Cory Corporation, 84 NLRB 972 at Pages 979 to 981**

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders the Respondent Local No. 1150, United Electrical, Radio & Machine Workers of America, affiliated with the Congress of Industrial Organizations; the Respondent United Electrical, Radio & Machine Workers of America, affiliated with the Congress of Industrial Organizations; and their officers, representatives, and agents, including the Respondents Pat Amato, Irving Krane, Lee Lundgren, Irene Berman, Faye Campbell, Virginia Charnota, May Mansfield, Leo Turner, Roy Spero, Virginia Kipta, Helen Nieminski, Frank Allen, and Alice Smith, shall:

1. Cease and desist from threatening employees of Cory Corporation, Chicago, Illinois, with loss of employment or other reprisals if they do not join Local No. 1150, United Electrical, Radio & Machine Workers of America, affiliated with the Congress of Industrial Organizations; from assaulting, attempting to assault, or threatening with reprisals the Company's employees if they refuse to support the Respondent Unions' strike at the Company's said plant; from engaging in picketing in such a manner as to bar employees from entering or leaving the plant; and from in any other manner restraining and coercing the Company's employees in the exercise of their right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, as guaranteed to them by Section 7 of the Act.



2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act, as amended:

(a) Post at the business offices of Local No. 1150, United Electrical, Radio & Machine Workers of America, C. I. O., and of United Electrical, Radio & Machine Workers of America, C. I. O., in Chicago, Illinois, copies of the notice attached hereto as an appendix. Copies of said notice, to be furnished by the Regional Director for the Thirteenth Region, shall, after being duly signed by an official representative of the Respondents Local No. 1150 and International, and individually by the Respondents Amato, Krane, Lundgren, Berman, Campbell, Charnota, Mansfield, Turner, Sperq, Kipta, Nieminski, Allen, and Smith, be posted by the Respondents immediately upon receipt thereof, and maintained by them for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material;

(b) Furnish to the Regional Director for the Thirteenth Region signed copies of the notice, attached hereto as an Appendix, for posting, the Company willing, on the bulletin boards of Cory Corporation where notices to employees are customarily posted. The notices shall be posted on the Company's bulletin boards and maintained thereon for a period of sixty (60) days thereafter. Copies of said notice, to be furnished by the Regional Director for the Thirteenth Region, shall, after being duly signed by the Respondents as provided in paragraph 2 (a) of this Order, be forthwith returned to the Regional Director for such posting;

(c) Notify the Regional Director for the Thirteenth Region in writing, within ten (10) days from the date of this Order, what steps the Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, as amended, be, and it hereby is, dismissed with respect to Bernard Lucas, Irving Gilbert, and John Bernard, and insofar as it alleges that the remaining Respondents violated Section 8 (b) (1) (A), except as found herein.

**Order in Smith Cabinet Manufacturing Company. 81 NLRB 886  
at Pages 892-893**

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that United Furniture Workers of America, Local 309, CIO, and United Furniture Workers of America, CIO, and their officers, representatives, and agents, including Fred Fulford, John Quimby, Edgar Burger, Gerald Mays, Gene Smedley, Marjorie Gorman, Angeline Jackson, and Wincel Harmon, shall:

1. Cease and desist from restraining and coercing employees of Smith Cabinet Manufacturing Company, Inc., Salem, Indiana, in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, as guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

- (a) Post in conspicuous places in the business office of the Local in Salem, Indiana, and in the business office of the International in New York City, where notices to members are customarily posted, copies of the notice attached hereto as an Appendix. Copies of said notice, to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by official representatives of

the Local and the International, and individually by Fulford, Quimby, Burger, Mays, Smedley, Gorman, Jackson and Harmon, be posted by these Respondents immediately upon receipt thereof and maintained by them for a period of sixty (60) days thereafter. Reasonable steps shall be taken by these Respondents to insure that said notices are not altered, defaced, or covered by any other material;

(b) Mail to the Regional Director for the Ninth Region signed copies of the notice attached hereto as an Appendix, for posting, the Company willing, on the bulletin board of Smith Cabinet Manufacturing Company, Inc., where notices to employees are customarily posted. The notice shall be posted on the Company's bulletin board and maintained thereon for a period of sixty (60) days thereafter. Copies of said notice, to be furnished by the Regional Director for the Ninth Region, shall, after being signed as provided in paragraph 2 (a) of this Order, be forthwith returned to the Regional Director for said posting;

(c) Notify the Regional Director for the Ninth Region in writing, within ten (10) days from the date of this Order, what steps the Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges that the Respondents restrained and coerced employees by Burger's statements to Mirel Mount, and to the company officials.

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**Order in Local Union No. 6281, United Mine Workers of America,  
100 NLRB 392 at Pages 395 to 396**

Upon the entire record in this case, and pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Local Union No. 6281, United Mine Workers of America, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Restraining or coercing employees of Consolidation Coal Company, Kentucky Division of Pittsburgh Consolidation Coal Company, its successors or assigns, by threats of force or violence, or in any other manner, in the exercise of their rights guaranteed in Section 7 of the Act, including the right to refrain from engaging in such activities.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at its business office and meeting hall, and in other conspicuous places, including all places where notices to members are customarily posted, copies of the notice attached hereto and marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by an official representative of the Respondent, be posted immediately upon receipt thereof and be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for the Ninth Region signed copies of the notice attached hereto and marked "Appendix A" for posting, the Company willing, in places where notices to employees of the Company employed in the vicinity of Jenkins, Kentucky, including employees at the Company's mines No. 207 and No. 214, are customarily posted. Copies of said notice, to be furnished by the Regional Director for the Ninth Region, shall, after being signed as provided in paragraph 2 (a) of this Order, be forthwith returned to the Regional Director for posting.

(c) Notify the Regional Director for the Ninth Region in writing within ten (10) days from the date of this Order what steps the Respondent has taken to comply herewith.

IT IS HEREBY FURTHER ORDERED, that except as otherwise found herein the complaint be, and it hereby is, dismissed.



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SUPREME COURT, U.S.

No. 530

APR 12 1955  
HAROLD B. WILLEY

In The  
**Supreme Court of the United States**  
October Term, 1955

UNITED AUTOMOBILE, AIRCRAFT AND  
AGRICULTURAL IMPLEMENT WORKERS  
OF AMERICA, AFFILIATED WITH  
THE CONGRESS OF INDUSTRIAL  
ORGANIZATIONS, UAW-CIO,

*Appellant,*

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD  
and KOHLER CO., a Wisconsin corporation,

*Appellees.*

**BRIEF OF APPELLEE, WISCONSIN EMPLOYMENT  
RELATIONS BOARD**

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In The  
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October Term, 1955

UNITED AUTOMOBILE, AIRCRAFT AND  
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OF AMERICA, AFFILIATED WITH  
THE CONGRESS OF INDUSTRIAL  
ORGANIZATIONS, UAW-CIO,

*Appellant,*

*v.*  
WISCONSIN EMPLOYMENT RELATIONS BOARD  
and KOHLER CO., a Wisconsin corporation,

*Appellees.*

**BRIEF OF APPELLEE, WISCONSIN EMPLOYMENT  
RELATIONS BOARD**

**STATEMENT OF THE CASE**

The findings of the Wisconsin Labor Relations Board which were the basis of this proceeding were not challenged. As the Wisconsin Supreme Court has pointed out,\* a cease-and-desist order and judgment of the nature of the one here challenged must be interpreted in the light of the findings.

Evidence of the activities out of which the challenged order and judgment arose consumed five days. That evi-

\**Hotel & R. E. I. Alliance v. Wis. E. R. Board*, (1941) 236 Wis. 329, 353, 291 N. W. 632, 295 N. W. 634.

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dence has been succinctly and undramatically condensed in the following unchallenged findings: (R. 7-8)

"1. That the officers, members and agents of Local Union No. 833, United Automobile Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations have engaged and are now engaging in mass picketing at the entrance to the plant of the Kohler Company at the village of Kohler, Wisconsin, and have been assisted and advised in such activities by Frank J. Sahorske, Robert Burkhardt, Jess Ferazza, Donald Rand, James Fiore, Frank Walleck and Raymond Majerus, International Representatives of the United Automobile Aircraft and Agricultural Implement Workers of America.

"2. That the officers, members and agents of the Respondent union have attempted by force, threats, intimidation and by mass pickets at the various entrances to the Kohler Company plant in Kohler, Wisconsin, to prevent the lawful work or employment by persons desiring to work for the Kohler Company.

"3. That the officers, members and agents of the Respondent union by gathering in large numbers and mass formation around the various entrances to the Kohler Company and obstructing and interfering with the free use of the public streets in the village of Kohler, Wisconsin, particularly with Industrial Road.

"4. That officers, members and agents of the Respondent Union have forcefully taken into custody persons attempting to enter the plant of the Kohler Company, forced them to accompany such officers, members and agents to the strike headquarters of the Respondent Union and prevented them from pursuing their lawful work and employment. That in addition officers, members and agents of the Respondent Union have followed the cars of persons attempting to enter

or leave the Kohler Company plant and picketed their homes and have threatened the persons desiring to work with physical injury."

On the basis of such findings, the Wisconsin Employment Relations Board entered an order requiring the appellant, its officers, members and agents to cease and desist from such activities (R. 9). The board's order was enforced by judgment of the Circuit Court of Sheboygan County, Wisconsin, and affirmed by the Supreme Court of Wisconsin.

### SUMMARY OF ARGUMENT

I. The state's judgment, requiring the appellant and its members to desist from mass picketing, injury to persons and property and similar conduct, is attacked solely on the contention that sec. 8 (b) (1) (A) of the Taft-Hartley Act gave the National Labor Relations Board exclusive power to regulate such activities. Proponents of sec. 8 (b) (1) (A) repeatedly stated in Congressional debates that it was not intended to prevent states from regulating coercive activities, but to encourage better law enforcement on a state and local level. Congressional records show that Congress felt the need to control labor violence was so urgent that there should be effectual remedies on both the national and local level, and that actual "duplication" of remedy should be permissible. References in debates to state labor boards and state labor laws show that Congress had under consideration the substantial number of state labor laws then in existence, and intended to give approval to such local regulation. Congress desired that states should



regulate in the manner they found most effectual to eliminate labor violence.

II. The state's judgment dealt with actual and threatened breaches of the peace. This court has repeatedly stated that Congress did not preempt regulation of such activities, but that such regulation remains within the reserved powers of states.

The state action under review is almost identical with that which this court held in the *Allen-Bradley* case to be a proper exercise of state police power. This court has referred approvingly to state regulation in the manner of the *Allen-Bradley* case at least four times since enactment of the Taft-Hartley Act.

The circumstances here present a far stronger case for state jurisdiction than did those of *International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651, so that to invalidate the state action here would necessarily result in overruling that case. Congress has indicated its approval of the decision in that case by failing to make a change in the law.

State and lower federal courts have interpreted this court's decisions as leaving in states authority to issue judgments preventing violence and mass picketing.

As this court has held, sec. 10 (a) does not authorize the National Labor Relations Board to cede to states jurisdiction as to matters which Congress has left within the reserved powers of states; and states have authority to act in such cases without any cession agreement.

II. As the *Allen-Bradley* case held, the validity of the state's action is to be determined on the basis of the spe-

cific findings and order, and upon only those provisions of the state law which were applied.

The state's action does not attempt to curtail any rights guaranteed by federal law.

The state has not applied the provisions of its law upon which the appellant bases its claim of conflict. The provisions here applied have no parallel in federal law; and the remedy granted is not one which could be given by the National Labor Relations Board.

The National Board has held that its authority under sec. 8 (b) (1) (A) is limited to requiring unions and their agents to desist from coercing employees of specified employers in their rights under sec. 7.

The state's action prohibits violence and mass picketing *per se*, because of infringement of rights of third parties, irrespective of whether the acts are committed by persons acting as agents of the appellant or for the purpose of coercing employees.

The state's action does not prohibit coercion of employees of the Kohler Company in the rights guaranteed to employees by sec. 7 of the Taft-Hartley Act; but prohibits coercion and intimidation of third persons in their legal rights as citizens rather than as employees.

IV. By preventing unlawful conduct, the state aids, rather than infringes upon, functions of the National Labor Relations Board. The state preventive action preserves the subject matter, so that an order issued by the national board can be effective after its necessarily time-consuming deliberations have been completed. The state

did not pass upon questions of employee status or upon any other issues which may be decided by the national board. The state action could not interfere with any remedial order which is within the power of the national board.

The same proceedings have stood together in the past, with advantage to administration of both federal and state laws, and without objection by the national board.

The National Labor Relations Board has expressed no objection to local action of this type but, on the contrary, has recognized this type of regulation as appropriate for states.

V. Immediate preventive action of the kind here used, is a necessity if violence is to be controlled in the manner envisioned by Congress. Unless immediate action can be taken in the locality where breaches of the peace occur, the damage will have been irrevocably done.

## ARGUMENT

### I.

CONGRESS INTENDED THAT ENACTMENT OF THE TAFT-HARTLEY ACT SHOULD NOT CURTAIL AUTHORITY OF STATES TO PREVENT SUCH ACTIVITIES AS MASS PICKETING AND VIOLENCE IN LABOR DISPUTES

#### A.

**The Legislative History of the Taft-Hartley Act Shows that Congress Intended by Sec. 8 (b) (1) to Encourage Supplemental Regulation by States**

Congress has not expressly precluded states from regulating in the field of labor relations; but, on the contrary, the Labor Management Relations Act, 1947 "leaves much to the states." The extent to which federal legislation has preempted the field, so as to preclude state action, is one of Congressional intent; and this court has several times had occasion to seek enlightenment from the Congressional records.<sup>1</sup>

The appellant contends that the state's action, which seeks to prevent mass picketing, picketing of homes, obstruction of highways and driveways, violence, and threats of violence, infringes upon the exclusive jurisdiction of the

<sup>1</sup>Garner v. Teamsters Union, (1953) 346 U. S. 485, 488, 74 S. Ct. 161, 98 L. ed. 228.

Idaho Plywood & Veneer Co. v. Wisconsin Employ. R. Board, (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691;

<sup>2</sup>Garner v. Teamsters Union, (1953) 346 U. S. 485, 488, 74 S. Ct. 161, 98 L. ed. 228.  
United Workers v. Laburnum Corp., (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1023;

Am'n. of Westinghouse, etc. Employees v. Westinghouse E. Corp., (1955) 348 U. S. 437, 75 S. Ct. 489, — L. ed. —.



National Labor Relations Board, under sec. 8 (b) (1) (A) of the Labor Management Relations Act, 1947, (29 U. S. C. 158 (b) (1)). The latter provision makes it an unfair practice for a "labor organization or its agents" to restrain or coerce "employees" in the exercise of their legal rights.

The discussions on House Conference Report #510 on H. R. 3020, 80th Congress, which contained an even more comprehensive provision on coercion, furnish positive indication that Congress did not intend to invalidate the provisions of the state law now before the court, at least when so applied as not directly to conflict with provisions of the federal law. See Legislative History of the Labor Management Relations Act, 1947, p. 883, where the following questions and answers appear:

"MR. KERSTEN of Wisconsin. \* \* \* I would like to ask the gentleman about that portion which pertains to the validity of State laws. Wisconsin and other States have their own labor relations laws. We are very anxious that disputes be settled at the State level insofar as it is possible. Can the gentleman give us assurance on that proposition, so that it is a matter of record, that that is the sense of the language and of the report?

"MR. HARTLEY. That is the sense of the language of the bill and of the report. That is my interpretation of the bill, that this will not interfere with the State of Wisconsin in the administration of its own laws. In other words, this will not interfere with the validity of the laws within that State.

"MR. KERSTEN of Wisconsin. And it will permit as many of these disputes to be settled at the State level as possible?

"MR. HARTLEY. Exactly."

This court quoted in *United Workers v. Laburnum Corp.*, (1955) 347 U. S. 656, 668, 74 S. Ct. 833, 98 L. ed. 1025, the following excerpt from Senate Report No. 105, 80th Cong., 1st Sess. 50, 1 Legislative History of the Labor Management Relations Act, 1947, p. 456:

"\* \* \* Some of these acts are illegal under State law, but we see no reason why they should not also constitute unfair labor practices to be investigated by the National Labor Relations Board, and at least deprive the violators of any protection furnished by the Wagner Act."

The quoted excerpt refers to coercion by unions under sec. 8 (b) (1).

The *Laburnum* decision, loc. cit. 347 U. S. 668-669, also quoted the following comment of Senator Taft:

"\* \* \* But suppose there is duplication in extreme cases; suppose there is a threat of violence constituting violation of the law of the State. Why should it not be an unfair labor practice? It is on the part of the employer. If an employer proceeds to use violence, as employers once did, if they use the kind of goon-squad tactics labor unions are permitted to use—and they once did—if they threaten men with physical violence if they join a union, they are subject to State law, and they are also subject to be proceeded against for violating the National Labor Relations Act. There is no reason in the world why there should not be two remedies for an act of that kind."

2 Legislative History of the Labor Management Relations Act, 1947, p. 1031.

The conduct described in the findings of the state board, and proscribed by its order, establishes this as one of the

"extreme cases" which Congress was so desirous of preventing that it felt there must be additional remedies; and that even actual "duplication" of remedies should be permitted.

One of the motives urged as a basis for adopting sec. 8 (b) (1) (A) of the Taft-Hartley Act was to encourage local agencies to take stronger steps to prevent this type of conduct. Among the local laws which Congress had in mind in offering such inducement was the type of law which Wisconsin has here applied. The following statement of Senator Ball, for example, refers to the violence in the Allis-Chalmers strike in Milwaukee which was handled by exactly the same type of order as that now before the court.

Senator Ball, in urging enactment of sec. 8 (b) (1), said:

"It is true, as the Senator from Oregon has stated, that some types of union coercion, including the violence of the mass picket line, visits to the homes of employees, such as have taken place in the Allis Chalmers strike in Milwaukee, and other such tactics are violations of State law in almost every State. I believe that the main remedy for such conditions is prosecution under State law and better local law enforcement. But I believe that one reason why we have had weak law enforcement in labor relations is that the Federal Government, through the Wagner Act and the Norris-LaGuardia Act, has in effect taken the position—and it has been so interpreted by the Supreme Court—that no Federal law restrains labor unions in any kind of activity in which they wish to indulge, including secondary boycotts, all kinds of monopolistic practices,

<sup>1</sup>Wisconsin E. R. Board v. Allis-Chalmers W. Union, (1946) 249 Wis. 590, 25 N. W. 2d 425.

and clear abuses of the original intent of the closed shop and union shop.

"It is no wonder that local communities and their peace officers have been reluctant vigorously to enforce law when they saw that the great Federal Government was holding the unions exempt from any kind of Federal regulation. The only laws we have had restrain employers and not unions. So it may well be that many of the types of activities of unions which we are seeking to restrain somewhat by this mild amendment are the kind of activities which would be corrected by good local law enforcement. But I think we shall encourage that kind of local law enforcement if the Federal Government, acting through Congress, states clearly its position that individual employees are entitled to their right of self-organization free from coercion from any source, whether it be the employer, the union, or some outside source." (Emphasis supplied)

2 Legislative History of the Labor Management Relations Act, 1947, p. 1471.

Senator Wiley, who supported the legislation, called the attention of the Senate to regulation by state labor boards, shortly before the respective Senate and House bills were referred to the conference committee:

"I have urged my colleagues on the Labor Committee, who will take this bill to conference, to insure the concurrent jurisdictions of State labor boards and the National Labor Board, so that insofar as possible each of the State boards may handle problems at the State level, rather than attempt to send all of the problems to Washington to be decided far from the scene of the dispute."

2 Legislative History of the Labor Management Relations Act, 1947, p. 1471.



The following provision, originally adopted by the House, (H. R. 3020, sec. 12 (a) (1)), which closely parallels sec. 111.06 (2) (f) of the Wisconsin Statutes, 1955, was omitted from the Taft-Hartley Act upon passage:

"Sec. 12. (a) The following activities, when affecting commerce, shall be unlawful concerted activities:

"(1) By the use of force or violence or threats thereof, preventing or attempting to prevent any individual from quitting or continuing in the employment of, or from accepting or refusing employment by, any employer; or by the use of force, violence, physical obstruction, or threats thereof, preventing or attempting to prevent any individual from freely going from any place and entering upon an employer's premises, or from freely leaving an employer's premises and going to any other place; or picketing an employer's place of business in numbers or in a manner otherwise than is reasonably required to give notice of the existence of a labor dispute at such place of business; or picketing or besetting the home of any individual in connection with any labor dispute."

1 Legislative History of the Labor Management Relations Act, 1947, pp. 204-205.

The omission of the provision demonstrates that the Congress did not intend to enter into *detailed* regulation respecting such activities as mass picketing, violence, and obstruction of streets.

The primary objective of sec. 8 (b) (1) was to reach economic coercion similar to the employer pressure previously reached by the parallel provision of sec. 8 (a) (1). With respect to violence, Congress intended "at least" to "deprive the violators of any protection" of federal law; and to give the national board the authority "also" to take

action if necessary to supplement state regulation. Such terms, quoted from Senate Report # 105, are explained and amplified in the following statement of Senator Ball as to the objective of sec. 8 (b) (1):

"So far as that goes, the mass picketing situation is not a major objective. What we are trying to reach here, it seems to me, is the coercive activity in which some unions and their agents indulge in their organizational and election campaigns; and, as the Senator from Oregon himself has said, those do not tend to be any tea parties; they frequently become rather rough.

"It seems to me that if they indulge in the same threats and coercion which, on the part of an employer, would be held to be unfair labor practices, they should be held accountable before the National Labor Relations Board for that activity. It might not have been necessary to do that in 1935, when the original act was passed; but I submit that the position of unions and their leaders and business agents in American industry today is infinitely different from what it was in 1935. Today they have very great power. Most of manufacturing industry today is covered by union agreements. The business agents and the unions are the exclusive representatives of all the employees, and I think it is generally accepted throughout industry that the ultimate objective of the labor movement is to organize every plant in the country. Knowing that, the individual employee is very likely to be easily influenced by any hint of coercion on the part of a union organizer and any threats made by these organizers carry much more weight today than they would have carried 10 or 15 years ago."

## 2 Legislative History of the Labor Management Relations Act, 1947, p. 1203.

"The purpose of the amendment is simply to provide that where unions, in their organizational cam-

paigns, indulge in practices which, if an employer indulged in them, would be unfair labor practices, such as making threats or false promises or false statements, the unions also shall be guilty of unfair labor practices.

“ \* \* \*

“In the past 2 years there have been a number of cases before the National Labor Relations Board, mostly contesting the results of elections, in which unfair practices of this type were alleged. Such practices are not covered by any State law. They do not go to the extent of violence, although quite often violence follows later. Such tactics are used by unions in organization and election campaigns.

“ \* \* \*

“The common practice in organization campaigns is for the business agent to threaten all employees and tell them that if they do not join the union before the election, or vote for it, they will be charged double initiation fees afterward. That is done in a great many cases. It is clearly an attempt to coerce and threaten employees in the exercise of the freedoms guaranteed by the act. However, such practices do not fall within the purview of State laws against violence and that sort of thing.

“ \* \* \*

“ \* \* \* if the unions, in their organizing drives, cannot persuade a majority to join voluntarily, they place a picket line in front of the shop, make scurrilous remarks about the employees as they go to work, and subject them to all kinds of abuse, even verging on physical violence, but very often not reaching the point where State laws would come into effect.”

2 Legislative History of the Labor Management Relations Act, 1947, pp. 1018-1020.



To the same effect is the reply of Senator Taft to the question whether there was not a difference between economic pressure exerted by an employer and that exerted by a union:

"MR. TAFT. I cannot see any difference. If a man is invited to join a union its members ought to be able to persuade him to join, but if they should not be able to persuade him they should not be permitted to interfere with him, coerce him, and compel him to join the union. The moment that such a man is threatened with losing his job if he does join, it at once becomes an unfair labor practice. Threats and coercion ought to become unfair labor practices on the part of a union.

"\* \* \* Certainly it seems to me that if we are willing to accept the principle that employees are entitled to the same protection against labor union leaders as against employers, then I can see no reasonable objection to the amendment proposed by the Senator from Minnesota.

"MR. TAFT. The main threat was, 'Unless you join our union, we will close down this plant, and you will not have a job.' That was the threat, and that is coercion—something which they had no right to do."

2 Legislative History of the Labor Management Relations Act, 1947, pp. 1027, 1028, 1029.

There was no indication by any proponents of the bill that sec. 8 (b) (1) was intended to supplant state regulation. It was in response to arguments by opponents of the bill (i.e. that regulation of such tactics as mass picketing and violence should be left to states) that the assur-



ances above quoted were given. The gist of remarks of all supporters of the bill was that the provision was intended to supplement state legislation, not to supplant it.

Both proponents and opponents of the Taft-Hartley Act were in agreement that mass picketing and violence should be prevented. A typical statement is that of Senator Ives, 2 Legislative History of the Labor Management Relations Act, 1947, p. 1024:

"If, in the city of New York, or in any other places, 'goon' squads enter into a plant to disrupt business, or anything of that nature or character occurs, we can have only complete condemnation for such action. But the answer to activities of that kind is not a proposal such as this. As was pointed out in the memorandum I read, there would be weeks, months, perhaps more than a year before action would be taken under this provision. For such things as 'goon' squads, the only answer is immediate and decisive police action, and if the authorities of the city of New York, or of any other place, are notified and do nothing about such a situation, then I have nothing but condemnation for such authorities.

"The trouble is that in too many localities people are taking too many of these absolutely unpardonable actions as a matter of course. \* \* \*

## B.

**Expressions By Proponents of Sec. 8 (b) (1) that States Should Continue to Regulate Mass Picketing and Like Activities Did Not Relate Solely to Criminal Prosecutions. They Referred as well to the Many State Labor Statutes then in Existence**

The appellant argues that the repeated references by proponents of sec. 8 (b) (1) to local law enforcement must be construed as limited exclusively to "existing criminal law," (Appellant's Brief, p. 37) and not to include "enforcement of state labor policy." (Appellant's Brief, p. 38)

That is belied by the express references, not only in the above excerpts but in many others, to state labor relations laws. The Wisconsin law, for example, was several times called to the attention of the Congress, including the very provisions here involved. The Wisconsin law which, then as now, provided a remedy for unfair practices both by employers and employees, preceded the Taft-Hartley

\*See, for example, the following statement of Senator Taft, 2 Legislative History of the Labor Management Relations Act, 1947, p. 1032:

"Mr. President, I should like to call attention to the fact that the amendment proposed by the Senator from Minnesota [Mr. Ball] is practically contained in the Wisconsin Labor Relations Act and has been used in Wisconsin as a means not only of preventing the coercion of employees but also of attempting, bringing such action as can be brought by administrative law, to end mass picketing. Of course, if administrative law fails, it would be necessary finally to resort to the police powers of the State. The Wisconsin Act provides that it shall be an unfair labor practice on the part of unions—

"To hinder, or prevent, by mass picketing, threats, intimidation, force, or coercion of any kind, the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

"The Wisconsin provision goes further even than the proposed amendment, and is more definite: • • •"

Act by 8 years; and had several times been before the United States Supreme Court.'

The references in the Congressional deliberations to state and local law were made in the light of the considerable volume of state labor legislation then in existence.

The summary appearing at pages i-iii in the forepart of *Recent State Labor Legislation*, by Edward F. Stanford, published by the Bureau of Public Administration, University of California, describes in general the labor legislation enacted by states in the 10 years prior to the Congressional deliberations on the Taft-Hartley Act:

"Prior to 1937, state legislation regulating industrial relations was confined to piecemeal laws restricting certain practices of labor and management. The Supreme Court decision, in 1937, upholding the Wagner Labor Relations Act, encouraged numerous states to enact similar comprehensive labor relations acts. In that year, Wisconsin, New York, Massachusetts, Pennsylvania, and Utah, followed later by Rhode Island in 1941 and Connecticut in 1945, enacted their so-called Little Wagner Acts. \* \* \*

"Beginning in 1939, there was a shift in the emphasis of state labor relations acts from a protective to a restrictive policy. By 1939, Wisconsin reenacted a more stringent labor relations act. Pennsylvania, later followed by Massachusetts and Utah, amended its original act by inserting restrictive clauses. Michigan, Minnesota, Colorado, and Kansas soon placed re-

<sup>1</sup>*Hotel & R. E. I. Alliance v. Wis. E. R. Board*, (1942) 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706;

*Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154;

*Christoffel v. Wisconsin E. R. Board*, (1943) (cert. den.) 320 U. S. 776, 88 L. ed. 466, 64 S. Ct. 99.

strictive clauses into their newly enacted labor relations acts. \* \* \*

"A concurrent development was the passage of state legislation regulating or prohibiting specific types of union and employee activities. A number of these laws were adopted in 1943, but the peak year was 1947 when thirty states passed union regulatory laws. Unlike labor relations acts, these laws aim almost exclusively at specific union methods and employee activities. \* \* \*

\* \* \*

"Thus, the significant trend in state labor laws in the past decade is the growth of governmental regulation of labor-management relations. Such extension has largely followed the evolution of the National Labor Relations Board from the Wagner Act of 1935 to the Taft-Hartley Act of 1947. \* \* \*

An article by Harry A. Millis and Harold A. Katz, entitled *A Decade of State Labor Legislation 1937-1947*, which appeared in 15 *University of Chicago Law Review* 282-310, says in part:

"A decade has elapsed since Wisconsin in 1937 became the first state to adopt a labor relations act. Since then no fewer than forty-two states have passed legislation affecting industrial relations and labor organizations. Ten of these states have adopted labor relations laws comparable to the federal statutes of 1935 and 1947. The others singled out some specific problems which have been dealt with on more of a piecemeal basis. The fact that such a large number of states have seen fit to regulate aspects of labor union activity indicates a widespread belief on the part of state legislators that an overriding public interest is involved in labor-management relations. Certainly there



has at no time been such widespread legislation in this field among the states.

\* \* \*

\* \* \* It is interesting to note that from the great mass of state legislation came many of the provisions of the Labor Management Relations Act of 1947. Congressmen had not been unaware of what had been transpiring in their home states. \* \* \*

\* \* \* The 1943 sessions of the state legislatures resulted in a great volume of labor legislation, and, notably, the beginning of widespread regulation of the organization, 'internal affairs' and procedures of labor unions. The banner year in state-labor legislation was, however, 1947, when thirty states enacted statutes regulating or restricting union activities. \* \* \*

\* \* \*

\* \* \* Legislation concerning union security provisions, coercion of non-union workers, picketing, boycotts, strikes, breach of contract and political action has been widespread. Such laws have been found in some states in statutes which regulate this or that aspect of labor activity. They have also been found in the labor relations acts, often added by subsequent amendment. \* \* \*

Ten states had complete labor relations acts comparable to the Taft-Hartley Act prior to enactment of the latter. As stated in the foregoing article, 15 University of Chicago Law Review, 284-285, and in the footnote on page 285:

"The most comprehensive formulation of public policy regarding collective bargaining and union activity is found in the ten states which have adopted labor relations acts. \* \* \*

Footnote, p. 285. "Colorado, 1943; Connecticut, 1945; Massachusetts, 1937; Michigan, 1939; Minnesota, 1939; New York, 1937; Pennsylvania, 1937; Rhode Island, 1945; Utah, 1937; Wisconsin, 1937. While the Kansas statute of 1943 and the Delaware enactment of 1947 are fairly extensive in scope, it is not felt that they properly fall under the heading of labor relations acts. The use of that term is here confined to acts administered by labor relations boards or commissions."

In addition, Hawaii and Porto Rico had similar legislation.

Other state labor regulation was by no means limited to criminal laws of general application. Even where state laws regulating union conduct provided penalties enforceable by criminal procedure, they were nonetheless enactments of state labor policy. It is said in *Recent State Labor Legislation*, supra, at p. 12:

"Since 1937 almost all states which have not enacted comprehensive labor relations acts have passed laws regulating certain union activities. Restrictions have been placed on union tactics, objectives, and internal affairs. \* \* \*

When proponents of the Taft-Hartley Act referred to enforcement of state and local regulation, in their discussions dealing with labor relations, it can not be presumed that they intended to ignore the substantial volume of state

\*Session Laws of Hawaii, Regular Session of 1945, Series A-68, Act 250; Laws of Porto Rico, 1938, Act 145.

labor relations laws, and to refer only to a segment of the criminal law. (Appellant's Brief, p. 33).

There are, naturally, references to criminal procedure in the Congressional debates. Some of such references were made by opponents of the bill, who argued against *any* further regulation of union activities—whether state or national. Arguments of opponents of the legislation as to why it should not be passed can hardly be a reliable indication of the intent of those other legislators who adopted the legislation over their objection—any more than the intent of parties to a contract can be determined by statements of third persons.

In any event, the gist of the argument of opponents of the measure was not that the remedy must be by criminal procedure in order to be effective; but that the remedy must be immediate and expeditious. It was argued (and generally agreed) that procedure before the National Labor Relations Board would necessarily involve "an administrative hearing, followed months or years later by a cease-and-desist" order.

If states should find other methods more expeditious than criminal trials of individuals (which are often notoriously time-consuming, particularly when courts are crowded and offenses numerous), surely the legislators who agreed that mass picketing and violence should be prevented did not desire to foreclose the more expeditious procedure.

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\*e.g. The statement that the law was not needed "because an effective remedy . . . is quick arrest, criminal trial," etc., referred to at p. 38 of appellant's brief.

\*2 Legislative History of the Labor Management Relations Act, 1947, p. 1021.

## C.

**The Appellant Argues that Reference in Congressional Debates to "two remedies" was Intended to Preclude any Regulation of Mass Picketing and Violence Except:**

- (1) Proceedings before the National Labor Relations Board
- (2) Prosecution Under General Criminal Laws of States.

**The Argument Disregards the Substance of the Statement**

The appellant has lifted an excerpt from the statement of Senator Taft on the question of federal-state jurisdiction (Appellant's brief, p. 34); and argues that, whereas the senator envisioned "two" remedies, the appellee's position calls for "three".

Reading the statement in context makes it clear that when Senator Taft used the term "two remedies" he was not referring to specific forms of proceedings at the local level. He envisioned one remedy on a *national* basis and another on a *local* basis, rather than any stereotyped form of action. Further, he envisioned a remedy as a cure—not merely a piece of litigation.

The very fact that he mentioned "two" remedies indicates that he was referring to parallel, or similar remedies—one on a national and one on a local basis. If he had intended to comprehend the forms of procedure which have been traditionally invoked to deal with a labor dispute, in absence of labor legislation, he would have had to use a far larger number than two.



There are *hundreds* of traditional remedies which would lie for the conduct described in the findings of the Wisconsin board. There would be criminal trials for assault, for false imprisonment, and for wilful damage to property, hundreds of civil forfeiture proceedings under local ordinances, for traffic violations, suits for injunctions by private parties against mass picketing,\* suits for injunctions by transportation companies for interference with deliveries, suits by individuals to restrain picketing of their homes, actions to require security to keep the peace, thousands of suits for damages for injuries to people and their property, *ad infinitum*.

If all such individual remedies should fail to prevent the unlawful conduct, the traditional remedies include martial law.

Congress was certainly aware that calling out troops was one of the traditional methods to which states had sometimes resorted under their police power to cope with labor violence. Such means had been used for many decades. It is reported in *Brief History of the American Labor Movement* by the United States Department of Labor, 81st Congress, 2d Session, House Document No. 662, that:

"In 1877 the railroad strikes, which originated in Pittsburgh but spread throughout the country, brought

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\* \* \* there exists a right of injunction today. There is a right of injunction against mass picketing. There is a right of injunction in other labor disputes. \* \* \*

Senator Taft, 2 Legislative History of the Labor Management Relations Act, 1947, 1395.

"Courts frequently have specified how many pickets should patrol entrances to plants." House Report 245 on H. R. 3020, 80th Congress, 1 Legislative History of the Labor Management Relations Act, 1947, p. 335.

in their wake riots, martial law, intervention of State and Federal troops, and some fatalities. \* \* \*

Surely it should not be argued that Congress ever intended federal laws to be so interpreted as to foreclose states from preventive remedies which fairly warn individuals what they can and cannot do, but would leave them free to resort to the "traditional" method of calling out the troops.

Such a multiplicity of procedures was not what Senator Taft had in mind when he referred to "two remedies." His statement was that "duplication" of remedies would not be objectionable. The remedy under the Wisconsin Act is by no means a "duplication" of one available under the federal law; but, even if it were, the Congressional desire to put a stop to violence was so strong as to permit actual duplication if necessary.

It has always been true that if an act violates a criminal law and also infringes upon civil rights of others, the perpetrator may be subject to liability in several forms of action. That has never been considered "duplication." Senator Taft was well acquainted with the English vocabulary, and presumably meant exactly what he said.

The Wisconsin law now being challenged has truly endeavored to provide the *one* additional remedy envisioned by Senator Taft, in lieu of the hundreds of other ineffectual procedures. The challenged action imposes no penalties; but, by defining in advance what is permissible, it seeks by *one* remedy to preserve the subject matter of the dispute for adjustment through "processes of justice" instead of

"trial by combat." It seeks only to avoid a multiplicity of suits and to prevent the type of "extreme" conduct which all members of Congress, both proponents and opponents of the law, agreed should not be tolerated."

The gist of the comments of proponents of the bill is that the kind of conduct involved in this case should be stopped; and that whatever "remedies" are necessary to effect that end should be supplied.

#### D.

**Even If the Expressions in Congressional Debates, of Intent to Leave Authority in States, Were Limited to "State and Local Police Laws," that Term Includes the Regulation now Before the Court, Both Under the Decisions of this Court and in Common Parlance**

The appellant takes the position that the term "state and local police laws" (Appellant's brief, p. 35) which was so "frequently referred to in Senatorial debates" includes only the criminal codes. Such an interpretation is far too restrictive.

Although the case of *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154 was decided before enactment of the Taft-Hartley Act, that does not alter the fact that the court there recognized that the precise law involved in this case was

<sup>10</sup>*Duplex Printing Press Co. v. Deering*, (1921) 251 U. S. 143, 148, 65 L. ed. 349, 41 S. Ct. 172. Dissent.

<sup>11</sup>For example, see the following comment of Mr. Landis:

"The Constitution . . . does not give us the right to block the entrance to places of employment and prevent employees from entering and leaving. Therefore, mass picketing must be abolished." 1 Legislative History of the Labor Management Relations Act, 1947, pp. 583-584.

"not basically different from the common situation where a state takes steps to prevent breaches of the peace in connection with labor disputes," and that it was an exercise of the state's "historic powers over such traditionally local matters as public safety and order and the use of streets and highways." (loc. cit. 315 U.S. 749, 751.)

Even in common parlance, the term "police laws" could not be so narrowly interpreted as the appellant seeks. The following is the complete definition of the noun "police," in Webster's New International Dictionary, Second Ed., except for that part relating to the military:

"1. Policy; sagacity or diplomacy in affairs; craft; also, civilization; social or group organization. Now rare.

"2. The internal organization or regulation of a state; the control and regulation of a community or state through the exercise of the constitutional powers of government; esp., such control and regulation with respect to matters affecting the general comfort, health, morals, safety, or prosperity of the public; by extension, the control and regulation of the affairs affecting the general order, health, etc. (as the cleanliness of a camp), of any community; also, the organization or system of laws for effecting such control.

"3. a The department of government charged with the enforcement of the laws and the maintenance of public order, safety, health, etc., having executive, judicial, and, in the broadest sense, legislative functions; now, esp., the department of government charged with the prevention, detection, and prosecution of public nuisances, crimes, etc. Its powers and functions vary widely in different states, municipalities, communities.

• • •



Certainly a law directed toward prevention of breaches of the peace and abatement of a public nuisance is a "police law" within the foregoing definition.

Surely the Congress, in its references to "state and local police laws," used the term in the sense in which this court had applied it in the *Allen-Bradley* case rather than in the restricted sense of a "Cops-and-Robbers" game.

Even if it were conceded that Congress had in mind some type of state control involving the enforcement of statutory prohibitions by uniformed policemen, the regulation here challenged could meet such narrow test. Under Ch. 111 of the Wisconsin Statutes certain prohibitions are prescribed on a parallel with the statutory prohibitions inherent in criminal laws, except that these prohibitions are prescribed only after a full hearing and court review. A criminal law, according to the appellant, might be enacted to prohibit mass picketing. Obviously what constitutes mass picketing may vary according to the circumstances. Five pickets might constitute a sufficient number to obstruct ingress to a small store whereas ten pickets might not do so in connection with a large plant. Under general criminal laws, each individual would be subject to the hazard of guessing what constitutes mass picketing in any given instance. In Wisconsin, rather than subject an individual to the hazard of general criminal laws of uncertain application against mass picketing, the legislature has provided a method of adapting the prohibitions to the circumstances, after a complete hearing, findings of fact, and court review, without penalty. This aids not only the persons desirous of conforming to law in ascertaining without jeopardy what

is permissible and/what is not, but it aids the local law enforcement officers whom the appellant concedes have a duty to prevent breaches of the peace. The most conscientious of law enforcement officers find it difficult, if not impossible, to prevent mass picketing through enforcement of criminal laws of general application, without legal guidance. The proscriptions of a board order, issued after hearing, provide the direction under which both enforcement officers and participants can know what is unlawful.

### E.

**Congress, in Expressing the Purpose to Leave Authority in States to Control Such Activities as Violence and Mass Picketing; Intended to Permit States to Regulate Effectively. It Did not Intend to Restrict Them to Methods Congress Had Found Ineffectual**

The appellant has asserted that sec. 8 (b) (4) resulted from Congressional concern over the "supposed failure of local law enforcement." (Appellant's Brief, p. 1F) At the same time, it asserts that Congress was speaking only in terms of "generally applicable criminal laws." (Appellant's Brief, p. 35) If Congress felt impelled to seek a new remedy because enforcement of criminal laws was deemed ineffectual, surely statements in the debates that the legislation was not intended to preclude state regulation of the condemned conduct should not be construed to mean Congress intended to leave the states only the methods which it regarded as ineffectual.

The fact that the Wisconsin law has been brought before this court at least seven times," by parties whose activities were curbed, demonstrates its effectiveness. By the same token, few of the cases brought to this court respecting unlawful activities in labor disputes have arisen through criminal prosecutions. That very fact may be one of the bases upon which Congress determined that attempts to prevent violence in labor disputes *solely* through enforcement of criminal law was ineffectual.

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<sup>12</sup>*Hotel & R. E. A. Alliance v. Wis. E. R. Board*, (1942) 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706.

*Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154.

*Christoffel v. Wisconsin E. R. Board*, (1943) 320 U. S. 776, 88 L. ed. 466, 64 S. Ct. 90.

*International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651.

*La Crosse Telephone Corp. v. Wisconsin Employ. Rel. Bd.*, (1949) 336 U. S. 18, 69 S. Ct. 379, 93 L. ed. 463.

*Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board*, (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691.

*Plenhinton Packing Co. v. Wisconsin E. R. Board*, (1950) 338 U. S. 953, 70 S. Ct. 491, 94 L. ed. 588.

## II.

THE DECISIONS OF THIS COURT UNDER THE TAFT-HARTLEY ACT HAVE BEEN GENERALLY INTERPRETED AS HOLDING THAT STATES HAVE AUTHORITY TO REGULATE THE KIND OF CONDUCT HERE INVOLVED, UNDER THEIR LABOR STATUTES. CONGRESS HAS INDICATED ITS APPROVAL OF SUCH INTERPRETATION BY MAKING NO CHANGE IN THE PROVISIONS OF THE LAW ON WHICH IT IS BASED

## A.

The State's Action In this Case Dealt Only with Conduct Involving Breaches of the Peace, Calling for "Extraordinary police measures." The Statutory Provisions, Under which the Specific Restrictions Were Defined, Apply to All Persons, Irrespective of Membership In a Labor Organization, In the Same Manner as Any Prohibitions In a Criminal Code

The appellant argues that because Wisconsin has singled out but "one phase of a complex labor dispute," its action undermines the comprehensive Congressional scheme for regulation. (Appellant's Brief, p. 13) It is the very fact, that the state action does single out one phase of the matter which brings it in the field recognized by Congress and by this court as appropriate for local regulation. Indeed, the appellant seems to concede that point in suggesting that states might deal with the conduct under criminal laws. (Appellant's Brief, p. 35) If, as appellant asserts, Congress intended that these breaches of peace must be dealt with exclusively as a part of an "integrated whole" so that one

<sup>13</sup>Garner v. Teamsters Union, (1953) 346 U. S. 485, 74 S. Ct. 161, 98 L. ed. 228.



"cannot separate out parts of the conduct \* \* \* and deal with it separately" (Appellant's Brief, p. 41), it would be difficult to rationalize the proposition that the *same* conduct might be proscribed by one *method* but not another.

However that may be, the appellant's contentions are contrary to the pronouncements of this court; and would, indeed, actually require reversal of at least one case.

This court has always recognized that the Taft-Hartley Act leaves *some* phases of the "complex labor dispute" within the field for state regulation. One of the most recent statements is contained in *Garner v. Teamsters Union*, (1953) 346 U. S. 485, 74 S. Ct. 161, 164, 98 L. ed. 228:

"The national Labor Management Relations Act, as we have pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."

The particular phases of the industrial problem here proscribed by the state are comprehended in the findings of the state board, that the appellants engaged in "mass picketing," "force, threats, intimidation," "obstructing and interfering with the free use of public streets," having "forcefully taken into custody persons" and "forced" them to go to strike headquarters, having "followed the cars of persons," having "picketed their homes" and threatening them "with physical injury," etc. (R. 7-9).

The board imposed no penalty, but issued a cease and desist order. As noted in *Hotel & R. E. I. Alliance v. Wis.*

*E. R. Board*, (1942) 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706, 708, the cease and desist order operates against only the type of violence and mass picketing which the state board found had been committed. As was there said, "The appellants could not be ordered to cease and desist from something they were not engaged in."

If the state could proscribe such conduct by criminal law of general application, and make it punishable in the first instance, it would seem anomalous to say that it can not proscribe it after a full hearing, by drawing the prohibitions more clearly than is possible under a general statute. Surely such a clear definition of proscribed conduct, which omits all punishment for first offenses, places the perpetrators in less jeopardy than if they must meet the hazard of deciding for themselves how many pickets may congregate on a sidewalk to avoid violating a criminal law against mass picketing.

The fact that a prohibition is applied in administration of a labor relations law makes it no less a prohibition which would be applied against "unorganized private persons" than if it were in an anti-trust statute. Sec. 111.06 (3), Wis. Stats. 1955, makes the restrictions of the state law applicable to "any person" who does "in connection with \* \* \* any controversy as to employment relations" any act prohibited to employers or employees. The law applies, of course, only to persons found to have engaged in such acts; just as a criminal statute prohibiting the sale of milk under unsanitary conditions applies only to persons who engaged in the sale of milk. The prohibitions are nonetheless of general application because they describe the circumstances under which they apply.

## B.

**Decisions of This Court Have Expressly and Repeatedly Recognized Authority of States to Regulate Exactly as Was Done in this Case**

As counsel for the appellant have pointed out, both the law, the circumstances, and the specific order attacked are substantially identical with those involved in the case of *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154.

It is quite true, as the appellant states, that the *Allen-Bradley* case was decided before the enactment of the Taft-Hartley Act.

This court has, however, in at least four cases decided since the enactment of the Taft-Hartley Act, recognized that jurisdiction over this type of conduct still rests with states. In *Garner v. Teamsters Union*, (1953) 346 U. S. 485, 488, 74 S. Ct. 161, 98 L. ed. 228, it was said:

"\* \* \* We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.' *Allen-Bradley Local v. Wisconsin Board*, 315 U. S. 740, 749. Nothing suggests that the activity enjoined threatened a probable breach of the state's peace or would call for extraordinary police measures by state or city authority. \* \* \*"

This court said in *International Union, etc. v. O'Brien*, (1950) 339 U. S. 454, 459, 70 S. Ct. 781, 95 L. ed. 978:

"\* \* \* That activity we regarded as 'coercive,' similar \* \* \* to the labor violence held to be subject

to state police control in *Allen-Bradley Local v. Wisconsin Board*, 315 U. S. 740 (1942). \* \* \*

In *International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651, the following appears:

"It seems to us clear that this case falls within the rule announced in *Allen-Bradley* that the state may police these strike activities as it could police the strike activities there, because Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board.  
\* \* \*

In the latter case, decided under the provisions of the Taft-Hartley act, this court commented that policing of "actual or threatened violence to persons and property is left wholly to states," and that "no one questions the states' powers to police coercion" accomplished by means of injury to property and threats to employees."

In *Weber v. Anheuser-Busch, Inc.*, (1955) 348 U. S. 468, 75 S. Ct. 480, the court said:

"4. On the other hand, in the following cases the authority which the State exercised was found not to have been exclusively absorbed by the federal enactments.

"In *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 10 LRRM 520, the State was allowed to enjoin mass picketing, threats of bodily injury and property damage to employees, obstruction of streets and public roads, the blocking of entrance to and egress from a factory, and the picketing of employees' homes. \* \* \*

<sup>1</sup>loc. cit. 336 U. S. 253.



In a more recent case, *United Workers v. Laburnum Corp.*, (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025, this court again recognized the areas for state jurisdiction which were described in the excerpt from the *Garner* case by saying:

"\* \* \* The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived. \* \* \*

**Where the Subject Matter Has Not Been Preempted by Congress, This Court Has Held States Free to Use any Method of Regulation They Deem Best. Regulation of Labor Violence, Upon Findings of Unfair Labor Practices Defined by State Statute, Has Been Expressly Recognized By this Court As a Proper Exercise of State Police Control**

In determining whether the specific conduct regulated was a proper field for state action, this court has never turned its decisions upon whether the state action was taken under a labor statute, under a criminal statute, or under common law rules; or whether the action resulted from direct court procedure or administrative regulation.

The *Garner* case involved the efforts of a private party to obtain a court injunction against conduct which was an

unfair practice under the federal law. This court held the state was precluded from exercising jurisdiction despite the fact that there was not involved any state unfair practice or administrative remedy.

In the case of *International Union, etc. v. O'Brien*, (1950) 339 U. S. 454, 70 S. Ct. 781, 94 L. ed. 978 the question arose by petition for an injunction to restrain criminal prosecution under a state statute which, although it carried a criminal penalty, was designated by this court as a state "labor mediation law."

In the case of *International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651 (the *Briggs-Stratton* case) where it was held there was no conflict, the procedure was by cease-and-desist order, upon findings of unfair practice as defined by state labor statute, identical to the procedure in this case.

In *Weber v. Anheuser-Busch, Inc.*, (1955) 348 U. S. 468, 75 S. Ct. 480, L. ed. , the question of state jurisdiction was again presented upon application for injunction by a private party against conduct which was specifically alleged to come "within the prohibitions of the federal act," as well as being contrary to state law dealing with restraint of trade.

The case of *United Workers v. Laburnum Corp.*, (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025 was an action for damages for common law tort.

It is significant that the only one of the five cases in which a proper field for state regulation was recognized dealt with a remedy for unfair labor practices defined by state statute—the same remedy and the same statute in-

volved in the *Allen-Bradley* case, and in the case now before the bar.

This court in the *O'Brien* case commented that it had held in the *Allen-Bradley* case that labor violence was "subject to state police control," thus expressly recognizing that Wisconsin's unfair labor practice regulation is a form of police control."

Similarly, in *International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 254, 69 S. Ct. 516, 93 L. ed. 651, the court referred to the "rule announced in *Allen-Bradley*," that the state may "police" these activities by the identical method used in this case.

The court has thus applied to regulation under the Wisconsin labor statute the very terms which the appellant argues can refer only to general criminal law.

#### D.

**This Court Has Expressly Ruled Against the Appellant's Contention that States Are Precluded from Regulating Under Unfair Practice Procedure. Where the Subject Matter Has Not Been Preempted, There is no Preemption of Method**

The appellant suggests that it is clear the state has no authority to prevent any other union conduct than that involved in this case, nor any employer unfair practices (Appellant's Brief, p. 13). The appellant overlooks (as did the party making the same contentions in *Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board*, (1949) 336

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<sup>17</sup>Id. cit. 339 U. S. 459.

U. S. 301, 69 S. Ct. 584, 587, 93 L. ed. 691) that Congress has left to the states the prevention of any unfair practices not expressly "(listed in section 8)."

The court said in the *Algoma* case, *supra*:

"\* \* \* It argues that the grant to the National Labor Relations Board of 'exclusive' power to prevent 'any unfair labor practice' thereby displaced State power to deal with such practices, provided of course that the practice was one affecting commerce. But this argument implies two equally untenable assumptions. One requires disregard of the parenthetical phrase '(listed in section 8)'; the other depends upon attaching to the section as it stands, the clause 'and no other agency shall have power to prevent unfair labor practices not listed in section 8.'

"The term 'unfair labor practice' is not a term of art having an independent significance which transcends its statutory definition. The States are free (apart from pre-emption by Congress) to characterize any wrong of any kind by an employer to an employee, whether statutorily created or known to the common law, as an 'unfair labor practice.' \* \* \* So far as appears from the Committee Reports, however, § 10 (a) was designed, as its language declares, merely to preclude conflict in the administration of remedies for the practices proscribed by § 8. The House Report, after summarizing the provisions of the section, adds, 'The Board is thus made the paramount agency for dealing with the unfair labor practices described in the bill.' \* \* \*

At page 22 of its brief the appellant has indicated that the court is concerned primarily with the question whether there is a similarity of *remedy*. That is true only in the event there is also an identity of subject matter. The gist



of the decision in *United Workers v. Laburnum Corp.*, (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025 is that before exclusion of state action will be presumed there must be both infringement of preempted subject matter and duplication of remedy. In that case there was identity of substance but not of remedy. In the case of *Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board*, (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691 there was identity of remedy but not preemption of substance. Accordingly, it follows that, if the subject matter is one left to states, they may regulate through the same remedy which Congress has provided for regulation of other subject matter.

There are many aspects of the employment relation for which an administrative remedy through the unfair practice procedure is provided by states. Minnesota, for example, has made it an unfair labor practice for an employer to pay less than the applicable rates set in his union contract to an employee hired away from another employer. See 15 LRRM 2203.

Wisconsin has made it an unfair practice for either an employer or a union to violate a collective bargaining agreement. This court's decision in *Ass'n of Westinghouse, etc. Employees v. Westinghouse E. Corp.*, (1955) 348 U. S. 437, 75 S. Ct. 489, —L. ed. —, was cited by the National Labor Relations Board in *United Telephone Co.*, 112 N. L. R. B. #103, in holding that the board was not the proper forum for parties seeking to remedy breach of contract. Surely it would not be contended that states are precluded from supplying an expeditious remedy for contract violation, through the unfair practice procedure, where such

violation has not been made an unfair practice under federal law.

### E.

In Order to Sustain Appellant's Contentions that the State Had no Jurisdiction in this Case, It Would Be Necessary Not Only to Abandon the Pronouncements of this Court and of Congress as to State Authority to Control Mass Picketing and Labor Violence; It Would Also Be Necessary to Overrule in toto *International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651 (The Briggs-Stratton Case). Since Congress Has Taken no Action to Indicate Dissatisfaction with such Pronouncements and Ruling, There is no Ground for Abandoning Them

The case now before the court is identical with *International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651, except that there is no doubt Congress intended the conduct in this case to be proper subject matter for state action; whereas there were no such clear indication of Congressional intent with respect to the conduct there involved. The court found the nature of the conduct in that case questionable enough to require considerable analysis before it was determined to be within the purview of state control.

With respect to the kind of conduct now before the court, however, it was there said:

"\* \* \* In this case there was also evidence of considerable injury to property and intimidation of other

employees by threats and no one questions the state's power to police coercion by those methods."

Even with respect to the concerted activities there involved, falling far short of the violence and mass picketing here prohibited, the court resolved all the questions now raised against the contentions of the appellant.

Both this case and the *Briggs-Stratton* case, supra, deal with activities which the court has held are not protected by federal legislation. Both deal with practices which the National Labor Relations Board is without "express" power to prevent.

In that case as in this, however, it was urged that, although there is no provision in the federal law defining precisely the same conduct as an unfair practice, the conduct might be considered by the National Labor Relations Board as an element involved in other definitions of unfair practices. In that case, it was urged that the national board was authorized to determine whether the so-called "quickie strikes" were an unfair practice as a refusal to bargain under sec. 8 (b) (3) of the Taft-Hartley Act; or as a defense under sec. 8 (a) (1), if an employer were charged with an unfair practice for disciplinary measures. It was in reply to these contentions that the court said:

"\* \* \* However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Act of 1947, that Congress designedly left open

<sup>14</sup>loc. cit. 336 U. S. 253.

<sup>15</sup>*Garner v. Teamsters Union*, (1953) 346 U. S. 485, 488, 74 S. Ct. 161, 98 L. ed. 228.

an area for state control' and that 'the intention of Congress to exclude the States from exercising their police power must be clearly manifested.' *Allen Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 750, 749. We therefore turn to its legislation for evidence that Congress has clearly manifested an exclusion of the state power sought to be exercised in this case.

"Congress made in the National Labor Relations Act no express delegation of power to the Board to permit or forbid this particular union conduct, from which an exclusion of state power could be implied.  
\* \* \*" (Emphasis supplied)

Apparently the appellant recognizes that its position would require overruling the *Briggs-Stratton case*, *supra*. It questions the wisdom of this court's having prejudged the issue "without prior National Labor Relations Board proceedings"; and adds that they "believe under more recent decisions a different result might have been reached." (Appellant's Brief, p. 31)

Apparently it is the appellant's position that the question what subject matter is preempted under the Taft-Hartley Act should be determined on a case-by-case basis by the National Labor Relations Board. We doubt if Congress ever intended that legal issues as to jurisdictional preemption under the Taft-Hartley Act should be subject to so much fluctuation and uncertainty as they would be if left to a case-by-case determination by an administrative agency. Certainly there was no indication that the changes effected by the Taft-Hartley Act were intended to conform to recommendations of the National Labor Relations Board with respect to what should constitute un-



pair practices within its exclusive discretion. To the contrary, as commented by Senator Taft in the debates upon the bill:

"The distinguished Senator from New York cited the opposition of the National Labor Relations Board to the particular amendment we are discussing. I think it should be made perfectly clear that the National Labor Relations Board came before our committee and opposed every amendment to the National Labor Relations Act. The only amendments to which they agreed were amendments which had already been forced upon them by action of the Supreme Court. They were willing to have those written into the law."

2 Legislative History of the Labor Management Relations Act, 1947, p. 1031.

Indeed, one of the major tenets in revision of federal legislation on labor matters was curtailment of the power of the national board, and the elimination of administrative "expertise". See, for example, the following commentary in House Conference Rept. No. 510, on H. R. 3020, 80th Congress, 1 Legislative History of the Labor Management Relations Act, 1947, pp. 559-560:

"\* \* \* In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact.  
\* \* \*

"As previously stated in the discussion of amendments to section 10 (b) and section 10 (c), by reason of the new language concerning the rules of evidence and the preponderance of the evidence, presumed expertness on the part of the Board in its field can no

longer be a factor in the Board's decisions. While the Administrative Procedure Act is generally regarded as having intended to require the courts to examine decisions of administrative agencies far more critically than has been their practice in the past, by reason of a conflict of opinion as to whether it actually does so, a conflict that the courts have not resolved, there was included, both in the House bill and the Senate amendment, language making it clear that the act gives to the courts a real power of review."

This curtailment of board functions was offered by Representative Hartley as one means by which Congress proposed to "protect the validity of state laws on labor." He introduced his commentaries on revision of the national board's organization and functions by the following remark:

"This bill once again protects the validity of State laws on labor. Here is how we do it. \* \* \*"

1 Legislative History of the Labor Management Relations Act, 1947, p. 883.

When the court has published pronouncements and decisions based upon an interpretation of Congressional intent, the failure of Congress to change the provisions of the law upon which the interpretation is based, indicates that Congress is satisfied with the meaning attributed to the law.

No sound basis is advanced for departing from the pronouncements that regulation of mass picketing and violence is left to states, as in the *Garner* case, *supra*; and that the state may police such conduct under unfair practice statutes, as held in the *Algoma* and *Briggs-Stratton* cases, *supra*.

## F.

**The Authority of the National Labor Relations Board to Cede Jurisdiction to States under Sec. 10 (a) Is Limited to Subject Matter Over Which the National Labor Relations Board Has Exclusive Jurisdiction. If Control of the Subject Matter Is Not Preempted, the National Board Has no Power to Cede Jurisdiction; and States May Continue to Exercise Their Reserved Power Without Cession**

The state's action in prohibiting mass picketing and violence in this case was taken under the power reserved to it by Article X of the Constitution. No permission from an administrative agency is prerequisite to the exercise of a reserved power unless Congress has first withdrawn such power.

This was the situation in *International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651. There the court was not concerned with the power of the National Labor Relations Board to cede jurisdiction, because there was no preemption in the first instance.

The court first examined the law to see whether Congress intended to preempt regulation of the specific conduct, because "the intention of Congress to exclude the States from exercising their police power must be clearly manifested." The court then said:

"\* \* \* We therefore turn to its legislation for evidence that Congress has clearly manifested an exclusion of the state power sought to be exercised in this case."

Having concluded that Congress did not intend to exclude states, and that the state's action was a "resort to its own reserved power over coercive conduct" the fact that there had been no cession of jurisdiction by the National Labor Relations Board was of no significance.

As pointed out in *Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board*, (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691:

"\* \* \* These words must mean that cession of jurisdiction is to take place only where State and federal laws have parallel provisions. Where the State and federal laws do not overlap, no cession is necessary because the State's jurisdiction is unimpaired.  
\* \* \*

The national board, itself, recognizes that there are certain spheres in which it can avail itself of local action to facilitate its administration, without first ceding jurisdiction.

See, for example, *T. H. Products Co.*, 113 N. L. R. B. #12, Lab. Cas. Par. 53,177, in which the National Board ruled that elections conducted by state officials would be given the same effect as those conducted by the national board in applying the one-election-a-year rule. See, also, *Marvin Wave Clip Co.*, Lab. Cas. Par. 53,231, in which the board held that a union which has established its majority in a state-conducted election was entitled to the benefit of the national board's contract-bar policy.

In the *Speilberg Mfg. Co.* (LLR June 23, 1955) Lab. Cas. Par. 52,968, the national board recognized an arbi-

<sup>1</sup>loc. cit. 336 U. S. 264.



trator's award, to the effect that employees' activities were such as to justify an employer in refusing to reinstate them after a strike.

Since the National Labor Relations Board has never executed an agreement ceding jurisdiction to a state, there is no exact precedent as to what might be a proper case.

There have, however, been a number of decisions by this court indicating what circumstances and conditions are necessary in order to indicate an intent to exclude state regulation.

One test was stated by this court in *International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651:

"Congress made in the National Labor Relations Act no express delegation of power to the Board to permit or forbid this particular union conduct, from which an exclusion of state power could be implied.  
\* \* \*"

*Garner v. Teamsters Union*, (1953) 346 U. S. 485, 74 S. Ct. 161, 98 L. ed. 228 indicated "public safety and order and the use of the streets and highways," and threats of "a probable breach of the state's peace" which "would call for extraordinary police measures by state or city authority" are areas reserved to states.

*Weber v. Anheuser-Busch, Inc.*, (1955) 348 U. S. 468, 75 S. Ct. 480 indicates that presumption of preemption exists with respect to "precisely the same conduct," for which a remedy is provided through federal unfair practice procedure.

On the basis of the excerpts from Congressional debates, and the decisions of this court, it would seem that, under the following situations, it was not intended that the powers of the national board should be exclusive. In such circumstances states may exercise their reserved powers without cession of jurisdiction. This proposition is qualified, of course, by the assumption that state regulation may not conflict with the policies of federal law.

1. "Extreme cases" of coercion, involving threatened breaches of the peace. Since the Congressional debates indicated there might be actual "duplication" in these cases, and since such comments related solely to sec. 8 (b) rather than 10 (a), it is clear Congress intended states should act under reserved rather than under ceded jurisdiction.

2. Cases where the specific state regulation is under a statutory provision which has no "parallel" in federal law."

3. Cases with respect to which Congress made "no express delegation of power to the Board to permit or forbid this particular union conduct." (Emphasis supplied)

4. Cases where the state remedy is not applied to "precisely the same conduct" made an unfair practice under federal law.

The analysis of the specific state action under review, to demonstrate that it did not invade the field with respect

<sup>19</sup> *Algoma Plywood & Veneer Co. v. Wisconsin Empl. R. Board*, (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691.

<sup>20</sup> *International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651.

<sup>21</sup> *Weber v. Anheuser-Busch, Inc.*, (1955) 348 U. S. 468, 75 S. Ct. 489.

to which Congress gave the National Labor Relations Board exclusive jurisdiction, appears under a succeeding heading.

### G.

**State Courts Have Uniformly Interpreted Decisions of This Court As Leaving Authority In States to Regulate Mass Picketing, Injury to Persons and Property, and Similar Conduct. If Congress Had Not Deemed Such Decisions Satisfactory, It Would Have Changed the Law**

Since the determination of this court in the *Garner* case," states have almost uniformly respected the doctrine of federal preemption in the field of peaceful picketing."

State and federal courts have generally understood the decisions of this court, however, as indicating that states are free to continue regulation of mass picketing and violence under whatever local laws they had found most effective. For example, see:

*Oil Workers International Union v. Superior Court*, (1951) 103 Cal. App. 2d 512, 230 P. 2d 71;

*Williams v. Cedartown Textiles*, (1952) 208 Ga. 659, 68 S. E. 2d 705;

*Douglas Public Service Corp. v. Gaspard*, (1954) 225 La. 972, 74 So. 2d 182;

*McQuay, Inc. v. U. A. W.*, (1955) — Minn. —, 72 N. W. 2d 81;

"*Garner v. Teamsters Union*, (1953) 346 U. S. 485, 74 S. Ct. 161, 98 L. ed. 228;

"See, for example, *Wisconsin E. R. Bd. v. Chauffeurs, etc. Local 200*, (1954) 267 Wis. 356, 66 N. W. 2d 318.

*Southern Bus Lines v. Amalgamated Ass'n. etc.*,  
(1949) — Miss. —, 38 So. 2d 765;

*Tallman Company v. Latal*, (1955) — Mo. —, 284  
S. W. 2d 547;

*Erwin Mills v. Textile Workers Union of America*,  
C. I. O., (1951) 234 N. C. 321, 67 S. E. 2d 372;

*Royal Cotton Mills Co. v. Textile Workers Union*,  
(1951) 234 N. C. 545, 67 S. E. 2d 755;

*Erwin Mills v. Textile Workers Union of America*,  
C. I. O., (1952) 235 N. C. 545, 68 S. E. 2d 813;

*Rice & Holman v. United Electrical Radio & Mach.*  
*Wkrs.*, (1949) 3 N. J. Super. 258, 65 A. 2d 638;

*Art Steel Co. v. Velasquez* (1952) 280 App. Div.  
76, 111 N. Y. S. 2d 198;

*Wortex Mills v. Textile Workers Union of America*,  
(1954) 380 Pa. 3, 109 A. 2d 815; ©

*Lodge Mfg. v. Gilbert*, (1953) 195 Tenn. 403, 260  
S. W. 2d 154;

*International Molders & F. W. U. v. Texas Found-*  
*ries*, (1951) Tex. Civ. App., 241 S. W. 2d 213;

*Johnston v. Colonial Provision Co.*, (1954) (D. C.  
Mass.) 128 F. Supp. 954;

*Westinghouse E. Corp. v. I. U. E.*, (1956) (D. C.  
N. J.) 37 LRRM 2414.

Similarly, in commenting on this court's decision in the *Garner* case, it was said in *Labor Relations Reporter*, December 21, 1953, 33 Analysis 29:

"\* \* \* It [the *Garner* decision] notes that the picketing involved no injurious conduct, mass patrolling, threats or other similar conduct not within the



express power of the NLRB and hence presumably subject to state action. \* \* \*

It is recognized that these interpretations are not controlling upon this court. It is submitted, however, that the fact that Congress made no modification of the federal legislation to counteract such trend is indicative of its satisfaction, with the interpretation that such matters as mass picketing and violence are subject to preventive action by states.

### III.

THE PORTIONS OF THE STATE LAW APPLIED IN THIS CASE DO NOT CONFLICT WITH FEDERAL LAW BY INTERFERING WITH ACTIVITIES PROTECTED BY THE LATTER. NEITHER DO THEY INFRINGE AN AREA PREEMPTED BY THE FEDERAL LAW

#### A.

**The Validity of the State Action Is to Be Determined on the Basis of the Specific Findings and Order, and the Specific Provisions of the State Statute applied**

It is conceded that this court has held that certain provisions of Ch. 111 of the Wisconsin Statutes are invalid as applied to disputes affecting commerce."

As pointed out in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154:

<sup>22</sup>E.g. *Plankinton Packing Co. v. Wisconsin Employ. Rel. Bd.*, (1950) 338 U. S. 953, 70 S. Ct. 491, 94 L. ed. 588.

"We are not under the necessity of treating the state Act as an inseparable whole. Cf. *Watson v. Buck*, supra. Rather, we must read the state Act for purposes of the present case as though it contained only those provisions which authorize the state Board to enter orders of the specific type here involved. That Act contains a broad severability clause. \* \* \*

As will be later shown, the state board did not in this case attempt to apply portions of the state law which appellant contends infringe the authority of the federal board under sec. 8 (b) (1) (A).

## B.

**The State Action Does Not Affect the Status of Employees Nor Impose Other Penalties. It Proscribes Certain Unlawful Activities Which Are Not Protected by Federal Law**

The judgment of the state court under review does not impose any penalty, nor does it purport to pass upon the status of any employees, nor their rights to reinstatement. It does no more than to define a course of conduct which is to be deemed unlawful if engaged in thereafter. Such proscribed course of conduct is not protected under the federal act.

The omission, in enactment of the Taft-Hartley Act, of the provisions of sec. 12 (a) (1) of H. R. 3020, which declared force, violence, threats, physical obstruction, mass picketing, and picketing of domiciles to be unlawful concerted activities, was not intended to signify that such conduct could be approved or authorized. On the contrary,

it was explained in House Conference Rept. No. 510, or H. R. 3020, 80th Congress, that the omission was primarily due to a fear that a specific enumeration of certain unlawful activities might give rise to arguments that other types of unlawful concerted activity were protected. The report stated, in part:

"Thus, the courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. \* \* \*

"By reason of the foregoing, it was believed that the specific provisions in the House bill excepting labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the act."

1 Legislative History of the Labor Management Relations Act, 1947, pp. 542-543.

This court said in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154, of the identical activities here proscribed:

"\* \* \* And we fail to see how the inability to utilize mass picketing, threats, violence, and the other devices which were here employed impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the federal Act. Nor is the freedom to engage in such conduct shown to be so essential or intimately related to a realization of the guar-

antees of the federal Act that its denial is an impairment of the federal policy. \* \* \* (loc. cit. 750)

### C.

**The Portions of the State Law Applied In This Case Have No Parallel In the Federal Law; nor Does the National Board Have Power to Grant the Remedy Provided by the State**

The appellant's contention that the state action is invalid is grounded solely on the argument that it infringes an area as to which sec. 8 (b) (1) (A) gives the National Labor Relations Board exclusive jurisdiction.

Reference to Congressional records with respect to sec. 8 (b) (1) (A) shows that the conduct covered by the state's order is of a kind for which Congress intended there might be actual "duplication" of remedies."

If duplication is permissible, it may seem superfluous to demonstrate that there is in fact no duplication here.

Since, however, the state board and state court have carefully delimited their remedy to try to avoid infringement of any area preempted by sec. 8 (b) (1) (A), such delimitation should be noted.

The provisions of sec. 8 (b) (1) (A), upon which the appellant urges the state regulation infringes, make it an unfair labor practice "for a labor organization or its agents \* \* \* to restrain or coerce \* \* \* employees in the exercise of the rights guaranteed in section 7."

<sup>22</sup> Legislative History of the Labor Management Relations Act, 1947, p. 1031.



The appellant urges that in this case the state applied a parallel provision, sec. 111.06 (2) (a), Wisconsin Statutes 1955, which it has quoted *in toto*. The only violation of subsec. (2) (a) included in the findings of the board was "picketing the domicile of persons desiring to work at the Kohler Company" (R. 8)."

The main portion of the state board's findings is predicated on sec. 111.06 (2) (f) and 111.06 (3), Wisconsin Statutes 1955, which, in combination, make it an unfair practice for "any person":

"To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

The quoted provision is not solely, nor even primarily, concerned with the relations between the employer and employee involved in a particular labor dispute; but is rather an implementation of the policy of the state statute enunciated as follows:

"It is also recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of third parties to earn a livelihood, transact business and

<sup>22</sup>As this court pointed out in *Hotel & R. E. I. Alliance v. Wis. E. R. Board*, (1942) 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706, the prohibitions are to be interpreted in the light of the findings.

engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint or coercion." (Sec. 111.06 (3), Wis. Stats. 1955)

Since the specific portions of the statutes here involved will be repeatedly referred to, they are set out for more convenient reference in the appendix to this brief.

There are several major differences between any remedy which could be granted under sec. 8 (b) (1) (A) of the Taft-Hartley Act and the one granted by the state.

(1)

The state board's order prohibits certain unlawful activities *per se* for the benefit of all members of the community, irrespective of whether the activities have any coercive effect upon employees. The national board has no authority under sec. 8 (b) (1) (A) except to require discontinuance of coercion of employees by such means.

The following provisions of the state board's order are not conditioned upon employment relations. They seek to prevent mass picketing and similar activities because of their interference with rights of the public and third parties, irrespective of whether they involve coercion of employees in the rights guaranteed under either federal or state law:

"It is ordered that the Respondent Unions, their officers, members and agents immediately cease and desist from \* \* \*

"3. Obstructing or interfering in any way with entrance to and egress from the premises of the Kohler Company.

"4. Obstructing or interfering with the free and uninterrupted use of public roads, streets, highways, railways or private drives leading to the premises of the Kohler Company.

"It is further ordered that the Respondent Unions, their officers, members and agents take the following affirmative action:

"1. Limit the number of pickets around the Kohler Company premises to a total of not more than 200, with not more than 25 at any one entrance. Such pickets are to march in single file and to at all times maintain a space of at least 20 feet in width at each entrance to the Kohler Company premises over which pickets will not pass and on which persons either on foot or in conveyance may freely enter or leave the premises without interference."

The National Labor Relations Board has recognized it has no authority under the federal act to enter such an order.

To establish a violation of sec. 8 (b) (1) (A) it is necessary to show that conduct restrains or coerces employees in their exercise of rights guaranteed by section 7. Threats, violence, mass picketing, or other conduct, even where attributable to a labor organization or its agents, are not prohibited except where it is coercive of employees' rights as to labor activities. See *Local 67, IBT*, 107 NLRB No. 104; *Kanawha Coal Operators Assn*, 94 NLRB 1731.

Because of the consequent limitation upon the remedial power of the national board to prevent the commission of unfair labor practices, board orders are carefully tailored. *Cory Corporation*, 84 NLRB 972, is illustrative.

There the board found that a union restrained and coerced employees in violation of sec. 8 (b) (1) (A) by engaging in mass picketing which obstructed the employees' entrance to and egress from the plant where they were employed. The board ordered the union to cease and desist "from engaging in picketing in such a manner as to bar employees from entering or leaving the plant." (loc. cit. 84 NLRB 980)

Discussing its remedial power, in the *Cory Corporation* case, the board noted that it lacks the power to "affirmatively regulate the number of persons who may properly picket an establishment."

The board continued:

"That is primarily a matter for the local authorities. Our function rather, as we see it, is limited to determining whether picketing as conducted in a given situation, whether or not accompanied by violence, 'restrained or coerced' employees in the exercise of their rights guaranteed under the Act, and, if so, to enjoin such conduct. In these circumstances the number of pickets has relevance only as it tends to establish the potential or calculated restraining or coercive effect of massed pickets to bar non-striking employees from entering or leaving the plant." (loc. cit. 84 NLRB 977)

That analysis emphasizes the fallacy in appellant's contention that the conduct proscribed in the provisions above quoted constitutes an enjoined violation of the federal act. These paragraphs are not based upon any finding that the conduct restrained or coerced employees—a finding indispensable to a federal order, but not required by the Wisconsin law.



(2)

None of the findings or prohibitions in the state order have reference to coercion of employees of the Kohler Company; nor to coercion of any employees with respect to such matters as are covered by sec. 7 of the Taft-Hartley act.

Because of the use of the terms "coercing" and "coercion" in the first two provisions of the state board's cease-and-desist order, the appellant argues that they cover the same field as sec. 8 (b) (1) (A).

There are significant qualifications in these provisions which show that the board carefully delimited its action to avoid intruding upon matters with which the national board might be called upon to deal.

The state board's action does not refer to "employees" of the Kohler Company, but to "persons desiring to be employed by the Kohler Co.," thus leaving completely untouched any functions of the national board, as to what persons have the status of employees with that company and are entitled to protection as such.

This distinction is significant in that the state action prevents molestation of persons who may not be employees, and who would therefore not be entitled to the protection of remedial action under the federal act. The federal act

<sup>21</sup> 1. Coercing and intimidating any person desiring to be employed by the Kohler Company in the enjoyment of his legal rights, intimidating his family, picketing his domicile, or injuring the person or property of such persons or his employee.

<sup>22</sup> 2. Hindering or preventing by mass picketing, threats intimidation, force or coercion of any kind the pursuit of lawful work or employment by any person desirous of being employed by the Kohler Company." (R. 9)

prohibits coercion of "employees" only; and the remedial orders of the national board are limited to preventing coercion of "employees" of the designated employers involved in the dispute. See, for example, *Perry Norvell Co.*, 80 NLRB 225, where the order was to "cease and desist from restraining and coercing employees of the Perry Norvell Co." The same is true of the other orders cited in the appellant's brief.

The use of the term "person" instead of "employee" in the first two paragraphs of the state board's order is further significant; because thus the provisions do not proscribe coercion with respect to "employee" rights such as are guaranteed in sec. 7 of the Taft-Hartley Act. Rather, they are directed toward preventing intrusion upon the legal rights of "third parties to earn a livelihood, transact business and engage in the ordinary affairs of life \* \* \* free from molestation, interference, restraint or coercion" (sec. 111.01 (2), *supra*), wholly apart from the additional rights of self-organization guaranteed them as employees.

Such intent of the state board is further established by the fact that, in referring to the "legal rights" protected against intrusion, it omitted the qualifying words found in sec. 111.06 (2) (a) of the Wisconsin statutes, "including those guaranteed in section 111.04." Sec. 111.04 of the Wisconsin Statutes deals with employee rights similar to those guaranteed in sec. 7 of the Taft-Hartley Act.

The state board's omission of any reference to employees, or to rights guaranteed to employees, was to make it clear that it intended to remain wholly outside the area covered by sec. 8 (b) (1) (A). Its remedial order was not

designed to protect "employee" rights guaranteed by sec. 7; but to protect the ordinary legal rights of third parties, as citizens, to be free from violence and molestation.

## (3)

The state's regulatory action is directed against individuals acting on their own behalf. The national board can give no remedy against individuals except when they act as agents of a labor organization.

The state's cease-and-desist order is directed against "members" of the appellant, in their individual capacities. The order is based on findings that the members engaged in the unlawful activities, without any findings that they acted as agents of the appellant in so doing. Such findings do not show any violation of section 8 (b) (1) (A) of the federal act, and would not support the issuance of any National Labor Relations Board order.

Section 8 (b) (1) (A) provides that it shall be an unfair labor practice "for a labor organization or its agents to restrain or coerce (a) employees in the exercise of the rights guaranteed in Section 7—." Section 10 empowers the National Labor Relations Board to prevent any person from engaging in any such unfair practice affecting commerce, by ordering any person which it finds "has engaged or is engaging in any such unfair labor practice" to cease and desist "from such unfair labor practices."

Accordingly, to direct an order against any employee, union member, or other individual, the board must find

that such person has engaged in prohibited conduct while acting as an agent for a labor organization.

"The statute does not regulate the conduct of individuals acting in a private capacity; only employees or labor organizations or their agents can commit unfair labor practices." *Sunset Line & Twine Co.*, 79 NLRB 1487, 1507, footnote 37.

Sec. 8 (b) (1) (A):

"\* \* \* is not directed toward such conduct by persons or employees in their individual capacity." *Perry Norrell Co.*, 80 NLRB 225, 245.

Furthermore, membership in a labor organization does not, *per se*, make the member an agent of the organization within the meaning of the Federal Act. *Sunset Line & Twine Co.*, 79 NLRB 1487, 1507-1508.

#### D.

#### **The National Labor Relations Board Does Not Deal With a Labor Dispute as a Whole, But Only with Specific Practices as Defined in the Federal Law**

The appellant asserts that the complex labor dispute involved in this case is to be handled as an integrated whole by the National Labor Relations Board.

It was never contemplated by Congress that the National Labor Relations Board could, or should, handle an entire labor dispute as an integrated whole. On the contrary, the board was definitely limited to the determina-



tion of certain questions of representation and to the prevention of certain specific unfair labor practices.

In the statement of policy contained in the federal act, there is no implication that the National Labor Relations Board is to decide labor disputes as such. It is limited to proscribing "certain practices on the part of labor and management which affect commerce and are inimical to the general welfare."<sup>28</sup> The findings and policies are to the effect, in part, that "certain" practices by some labor organizations have the intent or necessary effect of burdening or obstructing commerce.

The National Labor Relations Board is not the agency of the federal government delegated to undertake determination of a labor dispute as such. By the same act by which the National Labor Relations Board was given jurisdiction over unfair labor practices, Congress created an independent agency, the Federal Mediation and Conciliation Service, to assist in resolving the dispute as a whole.

No single agency, at least without the services of an army of investigators and representatives at its disposal, could handle all the ramifications of a complex labor dispute. Traffic violations, obstructions of streets, assaults upon persons, injury to property, prevention of picketing of domiciles, and of breaches of the peace in public places may involve hundreds, or even thousands, of separate cases. Questions whether workers injured in passing through picket lines are entitled to workmen's compensation must be settled by separate proceedings. See, for example, Workmen's Compensation Law Reports, Par. 1701, LLR Sum-

<sup>28</sup>Sec. 1 (6), Labor Management Relations Act, 1947, 29 U.S.C.A. sec. 150.

mary, March 9, 1956. The question whether the conduct of pickets precludes unemployment compensation is a matter for separate proceedings. See, for example, *Marathon Electric Mfg. Corp. v. Industrial Comm.*, (1934) 269 Wis. 394, 69 N. W. 2d 573 and *Streeter v. Industrial Comm.*, (1954) 269 Wis. 412, 69 N. W. 2d 583. Wage claims of employees, and other claims arising out of violations of employment contracts must be separately handled." Specific grievances are frequently resolved by arbitration.

Such ramifications of a labor dispute could be enumerated *ad infinitum*.

The National Labor Relations Board has neither the facilities nor the jurisdiction to handle *all* problems arising out of a labor dispute such as this, where thousands of persons engage in mass picketing, highway obstruction, and violence.

The comments of Phillip Ray Rogers, of the National Labor Relations Board, in his address of March 15, 1955, before the Association of General Contractors of America, Inc., at New Orleans, Louisiana, 35 LRR 467, recognized the limitations upon the board in dealing with labor disputes. Among other things he said:

"Contrary to the apparent belief of many, the Congress did not create the National Labor Relations Board as an agency to settle labor disputes. \* \* \*

"In the first place, I believe that the time consumed in resolving these disputes would be prohibitive. In

<sup>22</sup>For example, see, *Am'n of Westinghouse, etc. Employees v. Westinghouse E. Corp.*, (1955) 348 U. S. 437, 75 S. Ct. 489.

view of the emergency nature of these cases, time is of the essence, and in view of the involved nature of the Board's procedures, any decision which resulted could be more properly described as an epitaph than a solution."

#### IV.

THE STATE ACTION IN THIS CASE COULD NOT CONFLICT WITH ANY ADMINISTRATIVE REMEDY WHICH MIGHT BE GRANTED IN PROCEEDINGS BEFORE THE NATIONAL BOARD WITH RESPECT TO THE KOHLER CO. AND ITS EMPLOYEES. ON THE CONTRARY, IT ENDEAVORS TO POLICE THE SITUATION AND TO PRESERVE THE SUBJECT MATTER SO THAT THE NATIONAL BOARD CAN MORE EFFECTUALLY PERFORM ITS FUNCTIONS.

The appellant asserts as an apparent basis for federal-state conflict in the instant case that the National Labor Relations Board has asserted jurisdiction over the employer in representation proceedings. This court has expressly ruled that a certification by the National Labor Relations Board does not oust state jurisdiction with respect to unfair practices not "(listed in sec. 8)." It was said in *Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board*, (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691:

"It remains to consider whether certification of the Union by the National Labor Relations Board in 1942 thereby forever ousted jurisdiction of the Wisconsin Board to enjoin practices forbidden by Wisconsin law. Since the enumeration by the Wagner Act and the Taft-Hartley Act of unfair labor practices over which the National Board has exclusive jurisdiction

does not prevent the States from enforcing their own policies in matters not governed by the federal law, such freedom of action by a State cannot be lost because the National Board has once held an election under the Wagner Act. The character of activities left to State regulation is not changed by the fact of certification."

The appellant has also urged, as a ground of potential conflict, its unfair labor practice charges filed with the National Labor Relations Board July 8, 1954, upon which hearings have not yet been completed. The charges allege that the employer has been guilty of a refusal to bargain collectively, and of discriminatorily discharging a number of employees. The appellant asserts that the employer has offered in defense of its action the conduct which was the basis of the state board's cease-and-desist order.

Nothing in the state action under review could dilute or detract from any finding or order which the National Labor Relations Board might make on those issues. The state court's judgment says nothing except that, in the interim while the National Labor Relations Board is considering the issues of unfair labor practices before it, members of the appellant organization must not engage in violence or mass picketing. This they concededly have no right to do. The state board's findings will not bind the national board. The state board did not attempt to pass upon any issues which are before the national board, such as employee status. It is attempting only to preserve the subject matter so that there will be something upon which the remedies prescribed by the national board—when they are formulated—can operate. If the parties are permitted



in the interim to engage in unrestricted violence and mass picketing, the subject matter upon which the national board is authorized under the federal law to act might be wholly destroyed and the whole matter determined by "primitive methods of trial by combat" rather than "processes of justice."

Such action as was here taken by the state aids, rather than obstructs, the functions of the national board. That is illustrated by the comparable action of the two boards in connection with the dispute involved in *Marathon Electric Co.*, 106 NLRB 1171.

On May 16, 1952, the Wisconsin Employment Relations Board secured enforcement in the Circuit Court for Marathon County, Wisconsin, of an order prohibiting mass picketing and violence in connection with a strike at the Marathon Electric Company. In March, 1952, unfair practice charges had been filed against the employer with the National Labor Relations Board, involving some of the same activities. The proceedings of the National Labor Relations Board upon the unfair practice charges took a period of eighteen months. The board's order was issued September 29, 1953.

Because of the fact that the state action made it unnecessary for the National board to police the situation, it was enabled to conduct its proceedings with the deliberateness necessary to the satisfactory conclusion of the complex questions raised in connection with unfair practices and defenses under the federal act.

The action of the state board in the case before the court has not been urged before the National Labor Relations Board either in support of, or in defense to, any charge to be decided by the latter.

If the National Labor Relations Board deemed the state's cease-and-desist order to have even a tendency to interfere with the proceedings pending before it, it could protect its jurisdiction by bringing action to restrain state proceedings as was done in *Capital Service v. National Labor Relations Board*, (1954) 347 U. S. 521, 74 S. Ct. 699. The fact that it has not done so presumably demonstrates that the state action is not interfering with the administration of the federal law.

The National Labor Relations Board has also appeared before this court as *amicus curiae* in opposition to state jurisdiction in a number of cases." If the national board had any fear that the state regulation in this case would interfere with its functions, it would at the very least present its position to the court as *amicus curiae*.

If the national board does not appear to oppose state jurisdiction in this case, we believe it can be assumed that the action under review falls within the permissible area for state action under the administrative construction set out by the board's memorandum filed in *United Workers v. Laburnum Corp.*, (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025:

"The Board recognizes, of course, as this court recently stated in *Garner v. Teamsters, etc. Union*, 346

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For example,

*Weber v. Anheuser-Busch, Inc.*, (1955) 318 U. S. 468, 75 S. Ct. 480.

*United Workers v. Laburnum Corp.*, (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025.

*Garner v. Teamsters Union*, (1954) 316 U. S. 485, 74 S. Ct. 161, 98 L. ed. 228.

*Wisconsin E. R. Beard v. Plankinton Packing Co.*, (1950) 338 U. S. 953, 70 S. Ct. 491, 94 L. ed. 588.

*La Crosse Telephonic Corp. v. Wisconsin Employ. Rel. Bd.*, (1949) 336 U. S. 18, 69 S. Ct. 379, 93 L. ed. 463.

U. S. 485, 488, that under the act the states 'still may exercise (their) historic powers over such traditionally local matters as public safety and order and the use of streets and highways.'

"Appearing before the Senate Committee on Labor and Public Welfare in 1953 the Board's then chairman (Mr. Herzog) stated—

"There are, of course, aspects of labor controversies which the States have traditionally been free to control. Although earlier witnesses have apparently sought to convey a contrary impression, the Labor-Management Relations Act of 1947 has not cut into that freedom. We speak of the inherent police power of each sovereign state to deal with acts of violence or other threats to the peace.' Hearings before Senate Committee on Labor and Public Welfare, 83d Cong. 1st Sess. Part 4, P. 2123-2124, 2107.

"This statement continues to represent the Board's present views."

## V.

### IMMEDIATE PREVENTIVE ACTION AT THE STATE LEVEL IS NEEDED TO COPE WITH VIOLENCE

We believe that the kind of state regulation here involved is a practical necessity if the better law enforcement which Congress sought to encourage is to have the desired effect of preventing labor violence.

In a village such as that involved in this case, with a population of 1,716, the normal complement of policemen is three or four. Obviously they are inadequate to handle mass picketing involving 3,000 participants, certainly not

without definitive guidance. Even if they were able to identify and arrest all of the hundreds of disturbers, the local courts could not expeditiously handle the influx of trials in addition to their usual duties.

Many of the objectionable actions in these cases result from a lack of understanding what is permissible. If the excesses can be held in control by notifying participants through governmental order what is permissible and what is not, surely that is better than wholesale arrests or calling out the troops.

The violent conduct which sometimes causes havoc in labor disputes flares quickly and requires immediate action by local authorities—else the damage will be done.

### CONCLUSION

It is respectfully submitted that the judgment from which appeal was taken should be affirmed.

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## APPENDIX

Portion of the Taft-Hartley Act which Appellant Alleges Have Been Infringed

Portion of the State Law Applied in this Case

Sec. 8 (b) It shall be an unfair practice for a labor organization or its agents—

Sec. 111.06 \* \* \*

(1) to restrain or coerce  
(A) employees in the exercise of the rights guaranteed in sec. 7

(2) It shall be an unfair practice for an employee individually or in concert with others

(a) To coerce or intimidate an employee in the enjoyment of his legal rights \* \* \* or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family. (Emphasis supplied)

\* \* \*

(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

(3) It shall be an unfair practice for any person to do or cause to be done \* \* \* in connection with \* \* \* any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section.



No. 530

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1955

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, UAW-CIO,  
*Appellant,*

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD AND KOHLER Co., a Wisconsin Corporation, *Appellees*

BRIEF FOR THE AFL-CIO AS *AMICUS CURIAE* IN SUPPORT OF THE STATEMENT AS TO JURISDICTION AND IN OPPOSITION TO THE MOTIONS TO DISMISS

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**BRIEF FOR THE AFL-CIO AS *AMICUS CURIAE* IN SUPPORT OF THE STATEMENT AS TO JURISDICTION AND IN OPPOSITION TO THE MOTIONS TO DISMISS**

**INTRODUCTION**

This brief amicus curiae is submitted by the American Federation of Labor and Congress of Industrial Organizations with the consent of the parties, as provided for in Rule 42 of the Rules of this Court. It is being submitted because of the importance of the issue here presented to all labor organizations which would be subjected to the cumulative and conflicting sanctions provided for by both federal and state labor relations laws if the decision below were permitted to stand.

**THIS CASE PRESENTS A SUBSTANTIAL FEDERAL QUESTION WHICH HAS PROBABLY BEEN DECIDED ERRONEOUSLY IN THE COURT BELOW**

## I

**The Allen-Bradley Case**

Factually, this case is substantially the same as *Allen-Bradley Local 1111 v. Wisconsin Board*, 315 U. S. 740 (1942). Like *Allen-Bradley*, it is an action to enforce an order growing out of an unfair labor practice proceeding before the Wisconsin Employment Relations Board. The provisions of the Wisconsin labor relations statute on which the unfair labor practice order is based are the same as in *Allen-Bradley*. The nature of the union conduct claimed to violate the Wisconsin statute is substantially the same as in *Allen-Bradley*—i.e., coercive and violent action against employees to prevent them from working during a strike.

For these reasons, the Supreme Court of Wisconsin held, and the Wisconsin board here argues, that the federal preemption issue is the same as in *Allen-Bradley* and hence the appeal of the union should be dismissed.

There is one significant difference. *Allen-Bradley* was decided in 1942. The federal statute upon which the union's entire claim of conflict with state law here rests did not even exist then. It was not passed until 1947.

That is, of course, a considerable difference. When *Allen-Bradley* was decided, the Wagner Act was in effect. It prohibited certain employer unfair labor practices and provided a centralized administrative machinery for the protection of union and employee rights against such employer practices. There was no such thing as either federal substantive law or federal administrative procedure designed to control union unfair labor practices. Wisconsin's statute, on the other hand, while modelled on the federal act, regulated both employer and union unfair practices. The union did not argue in *Allen-Bradley* that Congress had

taken in hand the kind of union unfair labor practice there alleged. It argued, to the contrary, that the state's prohibition of union coercion might interfere with union activities protected by the Wagner Act.

This Court did not find the argument persuasive. It found that the nature of the state regulation was not such as to interfere with union activities protected by the federal statute and it concluded that the absence of federal regulation of union unfair labor practices (in 1942) left the states free to regulate them.

In 1947 the federal government enacted the Taft-Hartley Act. That Act not only, for the first time, laid down a substantive federal prohibition against union unfair labor practices. As was said in *Garner v. Teamsters Union*, 346 U. S. 485, 490, it also confided the "primary interpretation and application" of these new rules to the "specific and specially constituted tribunal" which had previously administered the rules against employer unfair practices. The "centralized administration of specially designed procedures" which this Court said in the *Garner* case "was necessary to obtain uniform application . . . and to avoid these diversities and conflicts likely to result from a variety of legal procedures and attitudes toward labor controversies" was made applicable to both employer and union activities. In particular, Section 7 was amended to state the right of employees to refrain from concerted activity as well as their right to engage in such activity. And a new Section 8(b)(1) was enacted which provided that it was an unfair labor practice for a union or its agents to restrain or coerce employees in the exercise of their Section 7 rights. Congress thus made subject to the centralized administrative procedures of the national board precisely the same kind of conduct which had previously been made subject, by §§111.06(2)(a) and (f) of the Wisconsin statute, to the administrative procedures of the state labor board.

The question now presented—and as yet not specifically



decided by this Court—is whether the enactment of Section 8(b)(1) prevents Wisconsin from enforcing, as to labor controversies subject to the federal statute, its own remedy for dealing with the identical labor relations problem.

*Allen-Bradley* did not decide that question. *Allen-Bradley* arose and was decided before the question even existed.

## II

### The Later Cases in This Court

This Court has, since the passage of the Taft-Hartley Act, continued to cite the *Allen-Bradley* case. These citations, both the Wisconsin Board and the Kohler Company argue, show that the passage of the Taft-Hartley Act did not change the holding of the Court in *Allen-Bradley* that Wisconsin's statute is valid.

Casual citation of a case decided under an earlier federal statute can never, we think, be regarded as a substitute for a decision by this Court that a new federal statute does not change the law. More importantly, however, the instances in which *Allen-Bradley* has been cited since 1947 are quite consistent with the contention of the union here that, in the light of the Taft-Hartley Act, Wisconsin's labor relations regulation cannot survive.

*Allen-Bradley* stands for the proposition that the states may continue to regulate aspects of union conduct which are not regulated by the Federal Act. There may remain truth in that proposition. But the proposition has no application when the aspect of union conduct which was regulated by Wisconsin in *Allen-Bradley* is subsequently regulated by federal statute. The passage of the Taft-Hartley Act may not have destroyed the general proposition of law upon which *Allen-Bradley* rested. It certainly made that proposition inapplicable.

*Allen-Bradley* has also been cited by this Court for another proposition—the right of the states to continue to exercise their “historic powers over such traditionally regu-

lated matters as public safety and order and the use of streets and highways." 315 U. S. 740, 749, quoted in *Garner v. Teamsters Union*, 346 U. S. 485, 488. This proposition, too, remains valid but also is inapplicable. As we said in our brief amicus curiae in *Weber v. Anheuser-Busch*, No. 97, October Term, 1954, 348 U. S. 468:

"The federal statute does not . . . prevent the states from enforcing their traditional policies which do not involve a weighing of the social interests involved in labor relations matters even though those policies happen to be applied in a labor-management controversy.

"Thus, the states may find liability for acts of violence and take appropriate police measures to prevent their recurrence, whether the violence occurs in connection with a strike, a political rally or in Joe's Bar. In such cases, the state is enforcing its policy against disturbances of the peace, not its policy relating to strikes, its policy relating to political matters, or its policy relating to the dispensing of alcoholic beverages. On the other hand, regulation which has as its basis a decision by the state that a particular kind of union activity should be restrained, or permitted only under certain conditions, is a matter of labor policy and cannot be enforced if the parties are subject to the federal act. Congress has pre-empted this field and closed it to state regulation."

Insofar as *Allen-Bradley* has been cited by this Court for the proposition that the states may exercise their traditional police powers to restrain breaches of the peace or other action which would violate state policy, whether or not that action occurs in connection with a labor controversy, it is good law. But that proposition does not control this case.

This is not a criminal prosecution under laws generally applicable to violence or breaches of the peace. It is not an action for damages which rests on general principles cut-

ting across labor relations laws. It is a case in which the State of Wisconsin, reserving its generally applicable police powers, has established a labor policy, pursuant to which it applies special remedies and invokes special procedures in cases in which coercive actions take place in a labor controversy.

The Wisconsin Employment Peace Act, as is plain on its face, does not express the state's general policy against violence or intimidation or breaches of the peace. Nor, contrary to the argument of the Kohler Company in its motion to dismiss, is it a general regulation of the streets and highways of the State of Wisconsin. The Wisconsin Employment Peace Act expresses the decision of the state as to the proper method of conducting strikes and other labor controversies, and provides administrative procedures, roughly comparable to those contained in the federal labor statute, by which the state's labor policy may be enforced. We think that the *Garner* case and the *Anheuser-Busch* case make it crystal clear that such state regulation must fail when applied to controversies over which Congress has assumed control.

This case is, indeed, almost precisely the same as the *Garner* case. All of the considerations present in the *Garner* case are present here. All of the arguments available to the employer in the *Garner* case are available here. And those arguments must fail here as they did in the *Garner* case.

There is but one difference. In *Garner* the union unfair labor practice, which the state also interdicted, arose under Section 8(b)(2) of the Taft-Hartley Act. Here the union activities claimed would violate Section 8(b)(1). Unlike 8(b)(2), actions which violate 8(b)(1) are actions which may in some cases also be punishable as violations of the state's general criminal law. That difference might very well be urged to support an application of the state's general criminal law against a claim of federal preemption. But the fact that this case involves matters which the police are



empowered to regulate generally, while it may serve to sustain an exercise of that ~~police~~ power, cannot serve to sustain the additional exercise of the state's labor relations policy.

### III

#### The Algoma Case

The state board relies heavily, in its motion to dismiss, upon the decision of this Court in *Algoma Plywood Co. v. Wisconsin Board*, 336 U. S. 301 (1949). This reliance is obviously misplaced.

The Algoma case concerned the provisions of the Wisconsin Labor Relations statute regulating union shop agreements. The case arose before the passage of the Taft-Hartley Act, but was decided after its passage. The opinion, therefore, has two aspects.

The portions of the opinion particularly relied on by Wisconsin here dealt with the pre-1947 validity of the Wisconsin statute. They are clearly, therefore, irrelevant since the federal regulation of union security agreements only began in 1947. The portions of the opinion dealing with the post-1947 validity of the Wisconsin statute were controlled by the fact that Congress, in Section 14(b) of the Taft-Hartley Act, specifically provided for the continued enforceability of state statutes regulating union shop agreements. Wisconsin could impose more restrictive regulations upon union shop agreements than those imposed by the Taft-Hartley Act for the simple reason that Congress in Section 14(b) expressly said that the states could do so. The *Algoma* case is no authority whatsoever for post-1947 state regulation of union unfair labor practices as to which no such specific provision exists.

### IV

#### The State's Police Powers

Wisconsin argues that the type of conduct here prohibited would have been within state jurisdiction if engaged in by



"unorganized private persons." Surely, Wisconsin says, "it was not intended by Congress to confer immunity on a single segment of the population." (P. 9.)

We agree.

But no one is claiming immunity here. No one argues in this case that it is not within the authority of local government to proscribe the type of conduct here involved under laws regulating all persons, including unions as well as "unorganized private persons." We are not aware that Wisconsin has made unions immune against the same laws relating to violence and breaches of the peace that apply to "unorganized private persons." Wisconsin can continue to apply those laws to unions and to "unorganized private persons" alike.<sup>1</sup> The question here is whether Wisconsin may impose additional restrictions and provide additional administrative remedies when unions and not "unorganized private persons" are involved in order to effectuate its own policy as to the kind of remedy and the kind of controls which should exist over labor disputes.

## V

### The Legislative History

An *amicus* brief on consideration of a jurisdictional statement is perhaps not the appropriate place for a lengthy examination of the legislative history of Section 8(b)(1). It is perhaps sufficient to say that the excerpts from that history referred to in the Kohler Company's motion to dismiss do, indeed, support the continued applicability of "State and local police laws"—as they are referred to by Senators Ives and Murray. They do *not* support the continued validity of state labor relations procedures. Careful examination of the Senate debates upon which Kohler principally relies makes it quite clear that Senator Taft, in referring to "the

<sup>1</sup> Indeed, §111.07(1) of the Wisconsin statute clearly says that "nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction." 20 LRRM 3163.

law of the state" and Senator Ball, in referring to "good local law enforcement," intended to refer to the generally uniform state criminal laws covering all cases of physical violence, not to the administrative procedures of state labor relations statutes.

The debate in the Senate over Section 8(b)(1) revolved principally around the objections of the opposing senators to any specific singling out of labor coercion for additional administrative handling when all violence, whether or not in conjunction with a labor dispute, was already subject to state criminal penalties. The proponents of Section 8(b)(1) argued—as the excerpts quoted by Kohler show—that the peace officers charged with enforcing such generally applicable criminal laws would be encouraged by the addition of a Federal administrative procedure dealing, in part, with the same ground. Neither the opponents nor the proponents of Section 8(b)(1) assumed that state labor relations procedures *and* federal labor relations procedures would be super-imposed on the existing criminal law.

This is shown most clearly in the very speech by Senator Ives quoted by Kohler. Following the portion quoted, in which the Senator said that Section 8(b)(1) would make unions liable twice for the same offense, he went on to point out that the existing state law remedies were more than adequate since the "effective remedy against such offenses is quick arrest, criminal trial, and conviction, not an administrative hearing . . ." (93 Cong. Rec. 4019, 2 Legislative History of the Labor-Management Relations Act, 1947, 1021). Senator Taft answered Ives' speech by pointing out that Wisconsin, in the very statute here in issue, had superimposed an administrative procedure upon the existing criminal law. "Of course," he said, while referring to the Wisconsin statute, "if administrative law fails, it would be necessary finally to resort to the police powers of the states." (93 Cong. Rec. 4028, 2 Leg. History 1032). He thus made clear what all assumed—that the repeated reference to existing state law

and the police powers of the states, which would be duplicated by Section 8(b)(1), were references to the general state criminal law against violence and coercion, not to state labor relations statutes.

We believe that the legislative history of the Federal Act, when considered as a whole, supports the claim of Federal preemption made here. But, whether we are right on this or not, the history certainly is not so clear against the claim as to warrant dismissal of the appeal.

## VI

### The Federal-State Conflict in This Case

This very case demonstrates the confusion and potential undermining of the Congressional enactment which follows from state enforcement of its own labor relations policy in a controversy which is also subject to the federal law. In this case the same strike has given rise to two unfair labor practice proceedings—one under the federal act and one under the Wisconsin act—in which the same issues are being litigated.

There is no question that the dispute out of which this proceeding arises is subject to the federal act. Indeed, unfair labor practice proceedings under the federal act, arising from earlier events, were pending against the Kohler Company when the present strike began. They were decided by the federal board on April 12, 1954. The board's order in that proceeding has subsequently been enforced in the federal courts. *N.L.R.B. v. Kohler Co.*, 220 F. 2d 3 (C. A. 7, March 7, 1955).

The very conduct here involved is also currently the subject of a National Labor Relations Board proceeding. The strike began on April 5, 1954. On April 15, the Kohler Company, filed its complaint with the Wisconsin Employment Relations Board. That proceeding resulted in the order which is under attack in this case. Meanwhile, the Union, on July 8, 1954, filed charges with the National La-

bor Relations Board that the company had failed to bargain collectively and had discriminatorily discharged certain employees. After investigation, a complaint was issued against the company by the General Counsel of the federal board. The company answered and the matter went to hearing in February, 1955. The hearings have, as of the date of this writing, not been concluded. *Matter of Kohler Co.*, N.L.R.B. Case No. 13-CA-1780.

The fact that both the federal and state labor relations board are seeking to exercise jurisdiction over the same controversy is, we think, significant enough. But even more significant is the fact that the identical issues are being litigated before both tribunals.

One of the contentions of the union and the General Counsel of the National Labor Relations Board in the federal proceeding is that the Kohler Company has refused to bargain in good faith with the union. The company, answering this contention, claims that the union, by engaging in the same course of action complained of in the Wisconsin proceeding, has itself failed to bargain in good faith and that this failure excuses the company.

The company's contention in the federal proceeding is set forth clearly in the answer which it filed with the National Labor Relations Board in December, 1954, which states, in part, as follows:

"[Respondent] further alleges that the Union was not bargaining in good faith in that beginning April 5, 1954, and continuing to date it engaged in, supported, urged and fostered coercive and illegal conduct, including interfering by force, threat, intimidation and mass pickets with persons desiring to pursue lawful work and employment for the respondent, attempting by such means to prevent lawful work or employment by persons desiring to work for the respondent; obstructing and interfering by mass pickets and by physical obstruction with the free and lawful use of public



streets, and with the free and lawful use of entrances to and driveways leading to the plant of respondent, threatening them with physical injury, picketing their homes, following and intimidating them on foot and in vehicles, subjecting them to harassing telephone calls, causing injury and damage to their homes and other property and to their persons, and by similar act and conduct all with the intent to force respondent to capitulate to the Union's demand as the price of securing discontinuance of said coercive and illegal conduct and accompanied by repeated statement by representatives of the Union that respondent could obtain relief from said illegal and coercive conduct by signing a contract satisfactory to the Union."

The Company has thus itself illustrated what is in any case plain: the federal act is an integrated whole. One cannot separate out parts of the conduct of one of the parties to a labor dispute and deal with it separately without destroying the scheme which Congress has established for the regulation of such disputes.

Picket lines are not conducted in a vacuum. Nor does bargaining take place without reference to what has happened on the picket line. Each act in a complex labor dispute is necessarily related to what has gone before and provides the basis for what will happen later. No particular aspect of the dispute can properly be seen when isolated from the whole dispute—either as a matter of life or as a matter of law.

The federal Act recognizes these interrelationships. Thus, the fact that an employer has engaged in unfair labor practices such as a refusal to bargain may, under the federal law, give reinstatement rights to employees who have engaged in coercive picket line conduct which would otherwise disqualify them. *N.L.R.B. v. Thayer Co.*, 213 F. 2d 748 (C. A. 1, 1954) cert. denied 348 U. S. 883. And, on the other

hand, the fact that violence has occurred on the picket line may, the Company is contending before the federal board, excuse it from the duty to bargain which it would otherwise have.

All of these issues are necessarily interrelated. Congress has enacted a statute under which the entire controversy can be taken in hand, under which both parties can obtain adjudication before a single body of their claims of unfair action, each against the other, and under which the whole pattern of conduct of both sides can be evaluated.

Wisconsin, it is true, has also enacted such a statute. Under the Wisconsin statute it is an unfair labor practice for an employer to refuse to bargain in good faith or to discriminatorily discharge employees for engaging in concerted activities. Were it not for the federal Act, the Wisconsin Board could take hold of the whole controversy. But the decided cases make it clear that the Wisconsin board cannot do so. *Plankinton Packing Co. v. Wisconsin Board*, 338 U. S. 953; *Garner v. Teamsters Union*, 346 U. S. 485. Even if appellees are correct in their contentions, only the single issue of union coercion can be decided by the Wisconsin board. The other issues in the dispute, their relationship to the claimed coercion, and indeed the factual re-determination of the coercion issue itself are all subject to adjudication in the proceeding before the National Labor Relations Board.

The question here, then, is whether Wisconsin may continue to enforce its own labor policy with respect to the single issue of union coercion, in splendid isolation from the other issues, even though: (1) that policy duplicates the federal policy, (2) the issue of coercion is integrally interrelated with other issues arising out of the same dispute which only the federal board can decide and (3) the coercion issue is itself subject to different determination in the procedure Congress has provided for the whole dispute. We think it plain that this kind of one-sided and truncated

adjudication should not be permitted to stand in the face of the federal Act.

### CONCLUSION

For the reasons above set forth, it is respectfully submitted that this Court should note probable jurisdiction.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1955

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NO. 530

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UNITED AUTOMOBILE, AIRCRAFT AND  
AGRICULTURAL IMPLEMENT WORKERS  
OF AMERICA, AFFILIATED WITH THE  
CONGRESS OF INDUSTRIAL  
ORGANIZATIONS, UAW-CIO,

*Appellant,*

v.

WISCONSIN EMPLOYMENT RELATIONS  
BOARD and KOHLER CO., a Wisconsin  
Corporation,

*Appellees.*

BRIEF OF JOHN BEN SHEPPERD  
ATTORNEY GENERAL OF THE STATE  
OF TEXAS, AMICUS CURIAE

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---

BRIEF OF JOHN BEN SHEPPERD  
ATTORNEY GENERAL OF THE STATE  
OF TEXAS, AMICUS CURIAE

---

TO THE HONORABLE SUPREME COURT OF THE  
UNITED STATES:

The State of Texas, as Amicus Curiae, appearing  
herein by its Attorney General, John Ben Shepperd,  
respectfully files this brief in this cause in support of  
the motion of Appellees, Wisconsin Employment Re-

lations Board and Kohler Co., to dismiss the appeal because of the importance to the State of Texas of the issues involved and the necessity that it retain the power to restrain the picketing of homes, the blocking of roadways, mass picketing and accompanying violence, and the intimidation and coercion of employees.

### **Interest of The State of Texas**

The State of Texas has a statute similar<sup>1</sup> to that of the State of Wisconsin which, among other things, makes it unlawful for any person or persons to interfere with, obstruct, or intimidate another in the exercise of his lawful right to work or to enter upon the performance of any lawful vocation, or in freely entering or leaving any premises. It is also made unlawful to engage in any form of mass picketing which, among other things, includes pickets which constitute or form any character of obstacle to the free ingress and egress from any entrance to any premises being picketed or to any other premises, either by obstructing said free ingress or egress by their persons or by the placing of vehicles or other physical obstructions.

### **Statement of the Case**

The Wisconsin Employment Relations Board conducted a hearing and found that union employees were engaged in mass picketing at the entrance of the company's plant. It was also found that they

<sup>1</sup> Art. 5154d, Tex. Civ. Stat. (Vernon's, 1948)



were attempting to prevent persons from working, that obstructions were placed in the public streets, and that homes of employees of the company were being picketed. The Board issued a cease and desist order. When this was disregarded, the Board petitioned the Circuit Court, which entered a judgment confirming the order of the Board and, by injunction, decreed enforcement of the order. The unions and individuals enjoined appealed from the judgment to the Wisconsin Supreme Court. That Court affirmed the judgment of the Circuit Court, 269 Wis. 583, 70 N.W.2d 194 (1955), holding that the authoritative interpretation of Federal statutes rests in the Federal courts, and that their highest court does not agree with Appellant's contention that the Taft-Hartley Act has taken from the States jurisdiction over such manifestations as mass picketing, intimidation, and obstruction of streets.

## ARGUMENT

### Point No. I

The Taft-Hartley Act does not preempt the policing of mass picketing, intimidation, and obstruction of Streets in connection with strikes.

### Argument and Authorities

The Supreme Court of Wisconsin correctly held that the State has jurisdiction in problems involving mass picketing, intimidation of employees and the obstruction of streets, and that the Congress had not pre-empted the field. Since the Federal Constitution neither cedes exclusive jurisdiction thereof to Con-

gress nor denies such jurisdiction to the States, it remains only to be decided whether congressional action in the form of the Taft-Hartley Act has pre-empted the field. Such pre-emption can be effected only by congressional specification or conflict.

The States have the power to legislate against what are found to be injurious practices in their internal, commercial, and business affairs so long as their laws do not run afoul of a specific constitutional prohibition or a valid federal law. *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299.

Beginning with *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, 315 U.S. 740 (1942) and ending with *Weber Et Al v. Anheuser-Busch Inc.*, 348 U.S. 468 (1954) this Court has consistently held that Congress had not pre-empted the field in matters of this nature and that the State would have jurisdiction rather than the National Labor Relations Board. As stated by the Wisconsin Supreme Court, the same facts are present in this case as were present in the *Allen-Bradley Local Case*. In that case the United States Supreme Court held that the mere enactment of the National Labor Relations Board Act had not excluded State regulation of the type which Wisconsin had exercised. It was therein stated:

"We agree with the statement of the United States as amicus curiae that the federal Act was not designed to preclude a State from enacting legislation limited to the prohibition or regulation of this type of employee or union activity. The Committee Reports on the federal Act plainly indicate that it is not 'a mere police court measure' and that

authority of the several States may be exerted to control such conduct. *Furthermore, this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.'* *Napier v. Atlantic Coast Line R. Co.* 272, U.S. 605, 611, and cases cited; *Kelly v. Washington*, 302 U.S. 1, 10; *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177; *H. P. Welch Co. v. New Hampshire*, 306 U.S. 79, 85; *Maurer v. Hamilton*, 309 U.S. 598, 614; *Watson v. Buck*, *supra*. *Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal board.*" (Emphasis added.)

It is respectfully submitted that jurisdiction of the conduct in question relating to actual or threatened violence to person or property is one wholly left to the States.

In *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1948), the Court upheld a State injunction which prohibited recurrent and unannounced work stoppage by union employees, stating:

"Congress made in the National Labor Relations Act no express delegation of power to the Board to permit or forbid this particular union conduct, from which an exclusion of state power could be implied. The Labor Management Relations Act declared it to be an unfair labor practice for a union to induce or engage in a strike or concerted refusal to work where an object thereof is any of certain enumerated ones. § 8(b) (4), 61 Stat. 140, 141; 29 U.S.C. § 158(b) (4). Nevertheless the conduct here described is not forbidden by this Act and no proceeding is authorized by which

the Federal Board may deal with it in any manner. While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. *Policing of such conduct is left wholly to the States. In this case there was also evidence of considerable injury to property and intimidation of other employees by threats and no one questions the State's power to police coercion by those methods.*" (Emphasis added.)

In *Garner v. Teamsters Union*, 346 U.S. 485 (1953), the Court struck down a State statute which had been used to enjoin peaceful picketing, holding that Congress had taken in hand this particular type of controversy where it affects interstate commerce and that therefore the grievance was not subject to litigation in the Courts of the State. However, the Court said that the State may exercise powers over such local matters as public safety and order and the use of streets and highways. At page 488 it was stated:

"Congress has taken in hand this particular type of controversy where it affects interstate commerce. In language almost identical to parts of the Pennsylvania statute, it has forbidden labor unions to exert certain types of coercion on employees through the medium of the employer. . . .

"This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is 'governable by the State or it is entirely



ungoverned.' In such cases we have declined to find an implied exclusion of state powers. *International Union v. Wisconsin Board*, 336 U.S. 245, 254. Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.' *Allen-Bradley Local v. Wisconsin Board*, 315 U.S. 740, 749. Nothing suggests that the activity enjoined threatened a probable breach of the state's peace or would call for extraordinary police measures by state or city authority. . . ."

In *United Construction Workers v. Laburnum Construction Company Corporation*, 347 U.S. 656 (1954), the Court held that the Taft-Hartley Act of 1947 had not given the N.L.R.B. such exclusive jurisdiction over the subject matter of a common law tort action for damages as to preclude an appropriate State Court from hearing and determining the issues where the acts were unfair labor practices under the State statute. It was clearly stated that if no conflict existed, State procedure survived.

In the most recent case before the Supreme Court, *Weber Et Al. v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1954), the State issued an injunction where two unions each claimed that work was to be done in a certain area only by its own workers. After an N.L.R.B. hearing the complaint had been dismissed because of no dispute. The respondent then filed a complaint in a State court alleging violations of other sections of the Taft-Hartley Act and violations of the

State's Restraint of Trade Law. Injunction under State statute was then issued. The United States Supreme Court struck it down, denying jurisdiction in the State court because the respondent had specifically alleged unfair labor practices within the jurisdiction of the N.L.R.B.

The *Allen-Bradley Local Case* was again cited by the Court as good authority. The Court stated at page 482:

... We do not read this as an unambiguous determination that the IAM's conduct amounted to the kind of mass picketing and overt threats of violence which under the *Allen-Bradley Local Case* give the state court jurisdiction."

In *Kelly v. Washington*, 302 U.S. 1 (1937), the Court states at page 9:

"Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. *Minnesota Rate Cases*, 230 U.S. 352, 402. States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. *The principle is thoroughly established that the ex-*

*ercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'"* (Emphasis added.)

Situations relating to mass picketing, obstructing entrance to and egress from establishments, and obstructing streets and public roads can best be dealt with at the State level rather than by the National Labor Relations Board. As stated above "the principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together." We respectfully submit that Congress did not intend by the enactment of the Taft-Hartley Act to deprive States of jurisdiction in areas of this nature. This Act specifically enumerates those areas of labor relations which Congress intended to control. The activities concerned herein were not included. These are matters relating to internal strife that go beyond the labor relations Congress intended to regulate. Conflicts of this nature constitute an inner turmoil which is regulated effectively by local and State enforcement bodies which are available to cope with these disorders immediately. Moreover, no adequate relief has been furnished by the Taft-Hartley Act to care for situations of this nature. To deny a State the right to police this type of conduct in the exercise of its police power would jeopardize and undermine the frame-

work of State government which was so firmly established by the framers of our constitution. It is therefore evident that the facts from which this controversy stems are not such as to come within the purview of the Taft-Hartley Act.

### **Conclusion**

We respectfully submit that federal labor legislation has not pre-empted the field and that the National Labor Relations Board has no jurisdiction in this controversy. These are matters clearly within those powers left to the States, and it is therefore urged that this Honorable Court affirm the judgment of the Wisconsin Supreme Court.

Respectfully submitted,

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IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1955.

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**No. 530**

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vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD  
and KOHLER CO., a Wisconsin corporation,

*Appellees.*

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BRIEF FOR THE STATE OF UTAH AND  
THE STATE OF GEORGIA AS AMICUS CURIAE

---

ON APPEAL FROM THE SUPREME COURT OF  
THE STATE OF WISCONSIN

---

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IN THE  
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OCTOBER TERM, 1955

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**No. 530**

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UNITED AUTOMOBILE, AIRCRAFT AND AGRICUL-  
TURAL IMPLEMENT WORKERS OF AMERICA,  
AFFILIATED WITH THE CONGRESS OF INDUS-  
TRIAL ORGANIZATIONS, UAW-CIO,

*Appellant,*

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD  
and KOHLER CO., a Wisconsin corporation,

*Appellees.*

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BRIEF FOR THE STATE OF UTAH AND  
THE STATE OF GEORGIA AS AMICUS CURIAE

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ON APPEAL FROM THE SUPREME COURT OF  
THE STATE OF WISCONSIN

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**PRELIMINARY STATEMENT**

This brief *amicus curiae* is submitted by the State of Utah and the State of Georgia pursuant to Rule 42 (4) of the Rules of this Court. The issue involved in this case is of such magnitude that in order to protect the health, safety and welfare of their citizens, the States of Utah and Georgia file this brief.

## QUESTION PRESENTED

The primary question presented before this Court for decision is whether the Wisconsin Employment Relations Board, or the labor board of any state, may take jurisdiction of a labor matter which involves mass picketing, interference with the use of public streets, and intimidation of employees, or whether the jurisdiction of such subject matter lies exclusively in the National Labor Relations Board. More precisely, has the Taft-Hartley Act so preempted the field of labor relations that a state is denied jurisdiction of labor relations which involve actual or threatened violence to persons and property, public safety and order.

## ARGUMENT

THE WISCONSIN SUPREME COURT CORRECTLY HELD THAT THE STATE OF WISCONSIN HAS JURISDICTION OVER SUCH MANIFESTATIONS OF LABOR RELATIONS AS MASS PICKETING, INTIMIDATION OF EMPLOYEES AND OBSTRUCTION OF STREETS.

This court has stated that in those fields of commerce where national uniformity is not essential, either the state or the federal government may act, and where there is a partial exercise of the commerce power by the federal government, a state may nevertheless legislate freely upon those areas of commerce which have been left unregulated by the federal government. *Cloverleaf Butter Company v. Patterson*, 315 U.S. 148 (1942). However, where the federal government exercises its commerce power so as to conflict with state regulations by express statute or implication, the federal legislation displaces the state power



and the federal government is said to have pre-empted the area in question.

In the case of *Kelly v. Washington*, 302 U.S. 1 (1937), Mr. Chief Justice Hughes, in writing the opinion of the court, stated:

"Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. . . . *States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power.* And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. *The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot be reconciled or consistently stand together* . . . . (Emphasis added)

An analysis of the relevant federal and state legislation indicates an absence of the irreconcilable conflict required to oust a state of jurisdiction over the subject matter in question. There is no express manifestation on the part of Congress in enacting the National Labor-Management Relations Act, the Taft-Hartley Act, 29 U.S.C.A. §141 et seq to exclude states from exerting their police power to deal with local exigencies. Nor is there

evidence that the federal administrative procedures are adequate to cope with local conduct which threatens public safety and order. To the contrary, the National Labor Relations Board has no express power or machinery to adequately prevent the infractions of public peace that result from mass picketing, threats of physical injury and property damage, and obstructions of public streets. Such activity demands immediate and "on the spot" policing, which the federal Board is impotent to provide. In view of the absence of express Congressional authority to exclude the states from exercising jurisdiction over the subject matter involved in this case, and the lack of preventive administrative procedure to adequately handle the problems so created; we submit that no conflict exists between the Taft Hartley Act and the Wisconsin Statutes, section 1106(2) (a) and (f), and therefore, the exercise of state police power is not superseded in this instance.

Our conviction that state power has not here been displaced is supported by precedent of this court. In the case of *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942) the court held that labor activity which involved "mass picketing, threatening employees desiring to work with physical injury or property damage, obstructing entrance to and egress from the company's factory, obstructing the streets and public roads surrounding the factory, and picketing the homes of employees" was a proper subject for state jurisdiction. The court stated:

"\* \* \* this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.' *Napfer v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611, 71 L. Ed. 432, 438, 47 S. Ct. 207, and cases cited; \* \* \*. Congress

has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board."

Although the court decided the *Allen-Bradley* case when the National Labor Relations Act, the Wagner Act, 29 U.S.C.A., Section 151 et seq. was in force, we submit that the 1947 amendment thereto, namely the National Labor-Management Relations Act, the Taft-Hartley Act, 29 U.S.C.A., Section 141 et seq. does not change the rationale and conclusion announced in that decision. Recent decisions of this court indicate that the labor activity involved in the *Allen-Bradley* case still remains a proper subject of state police power, and the interpretation by this court of the effect of Taft-Hartley legislation does not result in the displacement of state authority.

In the case of *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245, this court held that the State of Wisconsin could enjoin labor union activity that resulted in intermittent and unannounced work stoppages. In the course of the opinion, the court stated:

*"However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Act of 1947, that 'Congress designedly left open an area for state control' and that 'the intention of Congress to exclude the States from exercising their police power must be clearly manifested.' Allen-Bradley Local, U.E.R.M.W. v. Wisconsin Employment Relations Bd., 315 U.S. 740, 749, 750, 86 L. Ed. 1154, 1164, 1165, 62 S. Ct. 820. We therefore turn to its legislation for evidence that Congress has clearly manifested an exclusion of the state power sought to be exercised in this case.*

"Congress made in the National Labor Relations Act no express delegation of power to the Board to permit or forbid this particular-union conduct, from which an exclusion of state power could be implied. The Labor Management Relations Act declared it to be an unfair labor practice for a union to induce or engage in a strike or concerted refusal to work where an object thereof is any of certain enumerated ones. \* \* \* *Nevertheless the conduct here described is not forbidden by this Act and no proceeding is authorized by which the Federal Board may deal with it in any manner.* While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states. *In this case there was also evidence of considerable injury to property and intimidation of other employees by threats and no one questions the state's power to police coercion by those methods.*

"It seems to us clear that this case falls within the rule announced in *Allen-Bradley* that the state may police these strike activities as it could police the strike activities there, because 'Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board.' *There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards, because the Federal Board has no authority either to investigate, approve or forbid the union conduct in question. This conduct is governable by the state or it is entirely ungoverned.*" (Emphasis added).

The injunction in the foregoing case was issued while the Wagner Act was still in force. Nevertheless the remedy continued after the Wagner Act was amended by the Taft-Hartley legislation.



In the case of *International Union of U.A.A. and A. v. O'Brien*, 339 U.S. 454 (1949), this court struck down a Michigan statute which regulated peaceful strikes, the basis for the decision being that the federal government had pre-empted the labor field in that area. In the course of its opinion the court distinguished the foregoing situation from that in *International Union v. Wisconsin Employment Relations Board*, supra, and the *Allen-Bradley* case, supra. The court's statement is as follows:

"*International Union, United Auto Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245, 93 L. Ed. 651, 69 S. Ct. 516 (1949); upon which Michigan principally relies, was not concerned with a traditional peaceful strike for higher wages. The employees' conduct there was 'a new technique for bringing pressure upon the employer,' a 'recurrent or intermittent unannounced stoppage of work to win unstated ends.' *Id.*, 336 U.S. at 249, 264, 93 L. Ed. 660, 668, 69 S. Ct. 516. That activity we regarded as 'coercive,' similar to the sit-down strike held to fall outside the protection of the federal Act in *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 83 L. Ed. 627, 59 S. Ct. 490, 123 A.L.R. 599 (1939), and to the labor violence held to be subject to state police control in *Allen-Bradley Local, U.E.R.M.W. v. Wisconsin Employment Relations Board*, 315 U.S. 740, 86 L. Ed. 1154, 62 S. Ct. 820 (1942). In the *Wisconsin Auto Workers Case*, we concluded that the union tactic was 'neither forbidden by federal statute nor was it legalized and approved thereby.' 336 U.S. at 265, 93 L. Ed. 669, 69 S. Ct. 516. 'There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards, because the Federal Board has no authority either to investigate, approve or forbid the union conduct in question. This conduct is governable by the State or it is entirely ungoverned.' "

In 1953, this court decided the case of *Garner v. Teamsters Union*, 346 U.S. 485, and defined the jurisdiction retained by the states in the commerce field under the Taft-Hartley Act. The opinion stated in part:

"The national Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.

"This is not an instance of injurious conduct which the National Relations Board is without express power to prevent and which therefore either is 'governable by the State or it is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers. *International Union, U.A.W. v. Wisconsin Employment Relations Board*, 336 U.S. 245, 254, 93 L. Ed. 651, 663, 69 S. Ct. 516. Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.' *Allen-Bradley Local, U.E.R.M.W. v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749, 86 L. Ed. 1154, 1164, 62 S. Ct. 820. Nothing suggests that the activity enjoined threatened a probable breach of the state's peace or would call for extraordinary police measures by state or city authority."

The *Garner* decision therefore gives further recognition to the proposition that under the Taft-Hartley Act, a state may regulate and police labor activity similar to that involved in the *Allen-Bradley* case.

In *United Workers v. Laburnum*, 347 U.S. 656 (1954), this court quoted the *Garner* decision in reference to the

area of jurisdiction retained by the state in labor matters, and added:

"The care we took in the Garner Case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself a recognition that if no conflict had existed, the state procedure would have survived."

In 1955 this court again considered the question of state-federal jurisdiction in the field of labor relations and announced in *Weber v. Anheuser-Busch*, 348 U.S. 468, that (1) a state may not prohibit the exercise of rights which the federal acts protect; (2) a state may not enjoin conduct under its own regulation that which has been made an "unfair labor practice" under federal regulation; (3) where the National Labor Relations Board has established the "machinery" for handling certification matters and the Board would use its own procedure if called upon, the state is excluded from certifying a union. In contrast to the foregoing prohibitions on the exercise of state jurisdiction, the court added:

"4. On the other hand, in the following cases the authority which the State exercised was found not to have been exclusively absorbed by the federal enactments.

"In *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, 86 L. Ed. 1154, 62 S. Ct. 820, the State was allowed to enjoin mass picketing, threats of bodily injury and property damage to employees, obstruction to streets and public roads, the blocking of entrance to and egress from a factory, and the picketing of employees' homes. The Court held that such conduct was not subject to regulation

by the federal Board either by prohibition or by protection."

From the foregoing authorities it can be seen that the Taft-Hartley Act was not interpreted as having pre-empted the field of labor relations where the labor conduct involved "mass picketing, threats of bodily injury and property damage to employees, obstruction of streets and public roads, the blocking of entrance to and egress from a factory, and the picketing of employees' homes." The Taft-Hartley Act does not expressly, nor by implication, make provision for the prevention of conduct involved in the case at bar nor does it provide the machinery for adequately handling the abuses that may arise through this type of activity.

In *Garner v. Teamsters' Union*, supra, this court was disturbed because of the potential conflict that might arise between state and federal governments where state jurisdiction allowed in areas covered by federal legislation. The same problem was presented in *Bethlehem Steel Corporation v. New York Labor Relations Board*, 330 U.S. 767 (1946); *LaCross Telephone Corporation v. W. E. R. B.*, 336 U.S. 18 (1949); and in *Plankinton Packing Company v. W. E. R. B.*, 338 U.S. 953 (1953). Federal pre-emption was implied in those cases because of the conflict which resulted when the federal and state governments both took hold of the same subject matter.

The case of *Kelly v. Washington*, supra, emphasized the proposition that a state may exercise its police power, even though interstate commerce is affected, if the federal government has not acted in such a way as to suspend the state regulatory power. The state police power is super-



seded only if it conflicts with the federal power in a direct and positive manner. In the case at hand, we find no irreconcilable conflict. The federal government has not seen fit to enact legislation dealing with labor relations which involve the "traditionally local matters as public safety and order" presented here. As we have pointed out, this court has consistently referred to the *Allen-Bradley* fact situation as an area where state jurisdiction has not been superseded by federal action. Such reaffirmance has come since the Taft-Hartley Act of 1947.

It is submitted that there is sufficient precedent to sustain the position of appellees in this case. Of equal persuasion, however, is the policy consideration involved. Public welfare, health and safety have everything to gain by preserving state jurisdiction in the case at bar. The peculiar labor activities in question involve manifestations of violence and coercion, highly disruptive of public peace. Non-regulation of such activity is a source of real concern to a local community. Law and order in the field of labor relations has been the prime objective of both state and federal legislation, and harmony between labor and management can result only from an application of law and order.

For this court to hold that a state may not exercise jurisdiction over the subject matter presented here would precipitate conflict in the field of labor relations and permit disruptive practices to go unregulated. Such a conclusion would produce a retrogression of labor-management negotiation, with resultant permanent harm reflected in the lives and property of the citizens of a community.

## CONCLUSION

In view of the authorities cited and the reasons advanced, we respectfully submit that the decision of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

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